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In the Supreme Court of the United States

OCTOBER TERM, 1990

THREE BUOYS HOUSEBOAT
VACATIONS U.S.A., LTD.
Petitioner

vs.

HARVEY G. MORTS, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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QUESTIONS PRESENTED

I. Does traditional admiralty jurisdiction exist over a collision between a commercial service vessel and a houseboat occurring on the Lake of the Ozarks?

A. Should the Eighth Circuit be instructed to follow Supreme Court precedent on "navigability?"

B. In the face of contrary Legislative statements, can the Eighth Circuit restrict the jurisdiction of the federal courts solely because of actions of the Executive Branch explicitly not intended to restrict federal jurisdiction?

C. Should the conflict between the circuits on the requirement of "potential" versus "actual" navigability for admiralty jurisdiction be resolved to require only "potential" navigability?

II. Do alternate jurisdictional bases, outside traditional admiralty jurisdiction, exist which permit a federal court to address a vessel owner's rights under the Limitation of Liability Act (46 U.S.C.Appx. §§181 *et seq.*)?

A. Should federal jurisdiction related to the Limitation of Liability Act (46 U.S.C. Appx. §§181 *et. seq.*) specifically granted by the Congress be broadly construed?

B. Does *Richardson v. Harmon*, 222 U.S. 96 (1911) recognize a jurisdictional basis for a federal court to handle a limitation action involving an accident not within the admiralty jurisdiction?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the petitioner, Three Buoys Houseboat Vacations U.S.A., Ltd., and the respondents, Harvey G. Morts, Barbara Marlene Wilkerson, Clefford Dean Morts, Terry Gene Morts, Fred R. Greenburg, Frances V. Greenburg, Karron Lee Webb, Heather Webb, Holly Webb, Sharon Rice, and E. Keith Rice. The respondents in this Court are identical to the respondents below.

The parent companies of petitioner, Three Buoys Houseboat Vacations U.S.A., Ltd., are Entrepreneur Enterprises, Inc., Rannor Holding Corp, and Ideas Unlimited, Inc. Three Buoys Houseboat Vacations U.S.A., Ltd. has no affiliates or subsidiaries other that wholly owned subsidiaries.

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VACATIONS U.S.A., LTD.
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

Petitioner, Three Buoys Houseboat Vacations U.S.A., Ltd. prays for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eighth Circuit entered on December 21, 1990, or for a summary reversal of the Eight Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is reported at 921 F.2d 775 (8th Cir. 1990) and is reprinted in the Appendix, pages A-1 through A-10. (Reference to the Appendix will hereafter be simply by page number).

The Order and the Memorandum decision of the United States Court for the Eastern District of Missouri (Nangle, C.J.) are reported at 689 F.Supp. 958 (E.D. Mo. 1989) (A-26, A-27 through A-37).

JURISDICTION

Three Buoys filed a Complaint for Exoneration From or Limitation of Liability in the United States District Court for the Eastern District of Missouri on January 26, 1988, under the Limitation of Liability Act, 46 U.S.C.Appx. §§181 *et seq.*, (A-40 through A-41) and 28 U.S.C. §§1331, 1333 and 1337. (A-39). On June 27, 1988 the district court dismissed the Complaint for lack of subject matter jurisdiction and for failure to state a claim under the Limitation of Liability Act. Three Buoys timely appealed to the Eighth Circuit which affirmed the district court on July 5, 1989. Its first decision is reported at 878 F.2d 1096 (8th Cir. 1989) (A-11 through A-24). Three Buoys' Petition for Rehearing or, Rehearing *en banc* was denied on October 4, 1989, Judge McMillian voting to grant the Petition for Rehearing *en banc.* (A-25).

Three Buoys petitioned for certiorari which was granted. In *Three Buoys Houseboats Vacations U.S.A., Ltd. v. Morts,* 497 U.S. ____, 110 S.Ct. 3625 (1990), this Court vacated the Eighth Circuit's judgment and remanded the case for further consideration in light of *Sisson v. Ruby,* 497 U.S. ____ (1990). On remand, the Eighth Circuit did not alter the result of its earlier opinion in its decision reported at 921 F 2d 775 (8th Cir. 1990). (A-1 through A-10).

Three Buoys invokes the jurisdiction of the Court to review the judgment of the Eighth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional Provisions and Statutes involved are listed in the Table of Authorities and set forth in the Appendix at pages A-38 through A-45.

STATEMENT OF THE CASE

This case concerns whether an act of the Executive Branch should be construed by the Judicial Branch to divest the United States of Jurisdiction granted by the Legislative Branch. Specifically, should a court deny to a commercial vessel owner such as Three Buoys those rights granted by the Limitation of Liability Act to other commercial shipping operators simply because the Executive Branch, through FERC, has allowed a temporary obstruction to a navigable waterway, the Osage River?

On June 28, 1990, this Court vacated the Eighth Circuit's earlier opinion and remanded the matter "for consideration in light of *Sisson v. Ruby*, 497 U.S. ____ (1990)." The Eighth Circuit found no guidance in *Sisson* and rejected the spirit, if not the letter, of this Court's ruling that admiralty jurisdiction is to be liberally construed to protect commercial shipping.

In addressing *Sisson*, this Court specifically requested briefing and argument of whether this Court should reconsider *Richardson v. Harmon*, 222 U.S. 96 (1911). *Sisson v. Ruby*, 497 U.S. ____ (Order of January 22, 1990). This Court did not have the opportunity to address this issue in *Sisson*, because the issue was mooted by the clear existence of admiralty jurisdiction. This case provides the Court with the opportunity to address this issue of specific concern to the Court one year ago.

On August 2, 1987, a Three Buoys Houseboat Vacations U.S.A., Ltd. (Three Buoys) commercial service vessel collided with a houseboat on the Lake of the Ozarks while returning from a commercial service job. The accident occurred in the course of maritime service: the service vessel was returning from towing another vessel to a safe mooring. The accident occurred in the course of navigation: the service vessel was underway and collided with another vessel adrift in the channel. The accident occurred in the course of a commercial operation, and the allegations against Three Buoys suggest that the negligent operation of the service vessel presented a hazard to maritime commerce. The accident was allegedly caused either by the failure of the drifting vessel to display proper lighting or the failure of the service vessel to obey the uniform Rules of the Road governing navigation.

In excess of four million dollars ($4,000,000.00) of claims were filed against Three Buoys. Three Buoys is a corporation whose business is the purchase, charter and service of vessels. Three Buoys filed its Petition for Exoneration from or Limitation of Liability for damages arising from this collision allegedly caused by the navigational errors of the Three Buoys' vessel operator.

The Lake of the Ozarks is a body of water wholly within the State of Missouri formed by the impoundment of the Osage River, an historically navigable tributary of the Missouri River, by the Bagnell Dam. The Executive and Legislative Branches of the United States have continuously recognized the navigable quality of this waterway and its direct implication of federal interests. All pertinent federal authority issuing from these two branches of the Federal Government show consistent recognition of the federal interest in these waters. Only the Judicial Branch, through this decision, has rejected the federal interest in

this waterway.

Union Electric Company, a private utility company, was authorized by the Army Corps of Engineers to build and operate the Bagnell Dam, a lockless hydroelectric dam, pursuant to a license issued by the Federal Energy Regulatory Commission (FERC). The FERC license specifically reserves to the United States the right to require the removal of the dam, the right to construct necessary facilities for navigation, the right to use all water necessary for navigation, and the right to terminate the license. The license specifically declares that the Osage River is a navigable waterway of the United States affecting the interests of interstate or foreign commerce.

The Osage River is and was navigable in fact above and below the Bagnell Dam. (A-15; A-35). Congress has declared that the waterway is navigable far upriver of the accident site. *See*, 33 U.S.C. §41. (A-39). The Lake of the Ozarks is capable of sustaining commercial navigation because of its size. (A-15). Commercial navigation takes place on the Lake of the Ozarks by the carriage of passengers and goods for hire. The United States Coast Guard inspects passenger excursion vessels and has agreed to allow the State of Missouri to exercise primary policing of activities on the Lake. The United States Army Corps of Engineers retains authority to permit any obstruction to navigation on the Lake.

Three Buoys' Complaint invoked the Limitation of Liability Act, 46 U.S.C.Appx. §§181 *et seq.*, the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, 28 U.S.C. §§1331, 1333, 1337, and Rule 9(h) of the Federal Rules of Civil Procedure. Several claimants answered and moved to dismiss the suit. The Motions were granted on June 27,

1988 for lack of subject matter jurisdiction and for failure to state a claim under the Limitation Act. The district court held that no admiralty jurisdiction existed solely because the Lake of the Ozarks is *presently* incapable of sustaining interstate commercial shipping. The district court correctly found jurisdiction under 28 U.S.C. §§1331 and 1337, as a claim under the Limitation Act arises under a federal statute affecting commerce. (A-35) However, the court mistakenly assumed that the Limitation Act applied only to torts occurring on navigable waters under its limited admiralty definition. (A-36). Although the Limitation Act was extended in 1886 to expressly include "all vessels used on lakes, rivers or in inland navigation . . ." (46 U.S.C.Appx. §188) (A-40 through A-41), the district court limited this statute to read, in effect, "all vessels used within the admiralty and maritime jurisdiction." In Three Buoys' view, this judicial rewriting of Congressional statement is incorrect and not only shows a disregard for the proper apportionment of powers and responsibility within the three branches of the federal government, but also conflicts with this Court's decision in *Richardson*.

Three Buoys appealed to the Eighth Circuit which affirmed the dismissal of the Limitation and went further to reverse the district courts' holding that jurisdiction existed. The Eighth Circuit inexplicably stated that a Limitation Action is akin to a state law defense which did not arise under a federal statute. (A-16 through A-17). The Eighth Circuit refused to recognize the federal nature of either the limitation action or the Lake of the Ozarks. The Eighth Circuit held that "contemporary navigability in fact" or present interstate or international commercial shipping must exist for a valid limitation action to proceed. Under this decision, any closing of interstate navigation is presumably sufficient to reject admiralty jurisdiction. The decision gave no consideration to the exclusive activity of

Three Buoys, commercial shipping and chartering, in evaluating admiralty jurisdiction. Three Buoys, a commercial chartering operation, is, in the view of the Eighth Circuit, not entitled to the same protection or uniformity of treatment of other commercial shipping operations solely because FERC has temporarily authorized an obstruction to the Osage River.

Three Buoys petitioned this Court for relief which was granted on June 28, 1990, when this Court vacated the Eighth Circuit's decision and remanded the matter for consideration in light of this Court's opinion in *Sisson. Three Buoys,* 479 U.S. ____, 110 S.Ct. 3265 (1990).

On remand, rather than recognize the spirit of this Court's ruling in *Sisson,* Eighth Circuit simply reapplied its limited view of federal interest in the Limitation Act and the Lake of the Ozarks. Since this Court's opinion in *Sisson* did not specifically overrule *Livingston v. United States,* 627 F.29 165 (8th Cir. 1980) (a result not required in *Sisson*) the Eighth Circuit found no overpowering reason to change its view.

Three Buoys now prays for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eighth Circuit entered on December 21, 1990, or for a summary reversal of the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

I. Does traditional admiralty jurisdiction exist over a collision between a commercial service vessel and a houseboat occurring on the Lake of the Ozarks?

I.A.

Should the Eighth Circuit be instructed to follow Supreme Court precedent on "navigability?"

The Eight Circuit has taken an unwarranted and unjustifiably narrow view of admiralty jurisdiction in direct conflict with this Court's decisions in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Foremost v. Richardson*, 457 U.S. 668 (1982); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871); *The Montello*, 87 U.S. (20 Wall.) 430 (1874). The Eighth Circuit's requirement of actual, present, interstate commercial shipping as a prerequisite to admiralty jurisdiction is in direct conflict with the well-established "capability of use" rule set forth in this Court's precedents.

In *Livingston v. United States*, 627 F.29 165, 170 (8th Cir. 1980), the Eighth Circuit ruled that "the concept of 'navigability' in admiralty is properly limited to describing a present capability of waters to sustain commercial shipping," relying on *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972). *Livingston* misunderstood *Executive Jet* which imposes no such restriction on the exercise of jurisdiction. To impose a current, interstate, commercial activity requirement would make the decision to exercise jurisdiction overly fact specific. In this case, The Lake of the Ozarks was clearly navigable prior to the erection of the dam which, under the terms of its license, can be removed at any time by order of FERC. To establish a jurisdictional test of the navigability of a waterway subject to the temporary condition of interstate navigation provides no uniformity of treatment of vessel owners so critical to the admiralty jurisdiction.

This waterway was within the admiralty jurisdiction in 1930. *State of Missouri v. Union Electric Light & Power*

Co., 42 F.2d 692 (W.D.Mo. 1930). It was within the admiralty jurisdiction in 1957 and another dammed river was navigable in 1968. *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306 (8th Cir. 1957); *George v. Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968). In these prior Eighth Circuit decisions, the court recognized the long line of Supreme Court authority supporting the exercise of admiralty jurisdiction over these waterways. In *Loc-Wood*, the court stated:

> 'The Lake of the Ozarks was created by the Bagnell Dam in the Osage River. The lake is entirely within the State of Missouri but *is navigable within the admiralty and maritime jurisdiction of the United States. Propeller Genesee Chief*, 12 How. 443, 457, 13 L.Ed. 1058; *Southern Steamship Co. v. National Labor Relations Board*, 316 U.S. 31, 41, 62 S.Ct. 886, 86 L.Ed. 1246, 46 U.S.C.A. §188." (emphasis added) (245 F.2d 306, 307).

In *George*, a limitation action proceeding in admiralty, the same Eighth Circuit held:

> "If the river was navigable prior to construction of the dam, it continues to be considered as a navigable stream. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408, 61 S.Ct. 291, 85 L.Ed. 243 (1940); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 118, 41 S.Ct. 409, 65 L.Ed. 847 (1921)." (402 F.2d 977, 978).

The cases cited by the Eighth Circuit in its earlier decisions reflect the accurate test of navigability within the admiralty jurisdiction. In 1980, a panel of the Eighth Circuit departed from the Circuit's previous course and issued its opinion in *Livingston* contrary to the opinions of other

panels in *Loc-Wood* rendered in 1957, and *George*, in 1968. Apparently to cure the defect posed by *Livingston* of one panel contradicting prior decisions of separate panels, in *Three Buoys*, the Court at n.5 stated:

> As a matter of Court procedure, a panel cannot overrule a prior panel opinion of this court. For that reason, this opinion has been circulated to the court *en banc*, and the court *en banc* has approved it. (921 F.2d 775, 779).

This Court should require the Eighth Circuit to return to its earlier posture and follow controlling Supreme Court precedents, and should summarily reverse the Eighth Circuit on the test of navigability used in *Three Buoys*.

I.B.

In the face of contrary Legislative statements, can the Eighth Circuit restrict the jurisdiction of the federal courts solely because of actions of the Executive Branch explicitly not intended to restrict federal jurisdiction?

The Eighth Circuit determined that there was no admiralty jurisdiction because there was no present capability of interstate navigation on the Lake of the Ozarks apparently due only to the presence of the Bagnell Dam. Three Buoys submits that this is an incorrect position for the Judicial Branch of the United States Government to take in the face of express Executive and Legislative statements that the waterway remains navigable as it was historically and that the dam is temporary and subject to removal at the pleasure of the United States. The Judicial Branch cannot cavalierly ignore Legislative and Executive recognition of the navigability of this waterway.

As noted above, the FERC license under which the dam exists specifically reserves to the United States the right to require the removal of the dam, the right to construct necessary facilities for navigation, the right to use all water necessary for navigation, and the right to terminate the license. The license specifically declares that the Osage River is a navigable waterway of the United States affecting the interests of interstate or foreign commerce. The United States Coast Guard retains jurisdiction to inspect passenger excursion vessels but has delegated some of its primary authority to Missouri officials. If the Coast Guard did not have such authority, it could not delegate to Missouri. These departments of the Executive Branch, as well as the United States Army Corps of Engineers, recognize continued federal interests in navigation on the Lake of the Ozarks.

Congress has also designated this waterway as navigable. Congress has declared that the waterway is navigable far upriver of the accident site. *See*, 33 U.S.C. §41. Moreover, in the original Act incorporating this land into the United States, Congress specifically declared that the navigability at the time of incorporation would remain in perpetuity. Pursuant to 33 U.S.C. §10, all navigable waters in the former Territories of Orleans and Lousiana shall be and forever remain public highways. Missouri is within the former Territories of Orleans and Louisiana. Pursuant to §15 of the Organic Laws, Territory of Missouri, Act of Congress, June 4, 1812, at 95, 2 U.S.Stat. 743:

> "... The Mississippi and Missouri Rivers, and the *navigable waters flowing into them, and the carrying places between the same*, shall be common highways and forever free to the people of the said territory and to the citizens of the United

> States, without any tax, duty or impost therefor." (emphasis added).

Pursuant to §2 of the Enabling Act, Act of Congress, March 6, 1820, 22 U.S.Stat. 545, which authorized the people of Missouri to form a government and be admitted to the Union:

> ". . . the river Mississippi, and the navigable rivers *and waters leading to the same,* shall be common highways, and forever free, as well to the inhabitants of the said State as to other citizens of the United States, without any tax, duty, impost or toll therefor imposed by the said State."

These provisions cannot be overlooked and ignored by the Eighth Circuit in determining whethher the Judicial Branch will give effect to the Limitation Act, a Congressional action intended to address issues related to navigation on waters within the federal jurisdiction. This Court should clarify the purposes of the congressional actions and the Excutive's exercise of jurisdiction over these waters by correcting the Eighth Circuit's affront to the other two branches of the Government.

I.C.

Should the conflict between the circuits on the requirement of "potential" versus "actual" navigability for admiralty jurisdiction be resolved to require only "potential" navigability?

As set forth in Section I.A. above, this Court has long held that "potential" or "historical" navigability is the only requirement for admiralty jurisdiction. There is now a schism between the circuits which should be re-

solved. The Sixth Circuit, in *Finneseth v. Carter,* 712 F.2d 1040, 1045 (6th Cir. 1983) stated:

> "No Supreme Court case imposes the requirement that navagability only exists, for purposes of admiralty jurisdiction, if the lake or river is currently or presently being used as a highway for interstate commerce. This requirement has been imposed, however, by the Eighth Circuit, despite the contrary language of futurity, such as "susceptibility," "capability," and "may be" conducted or carried on, in early Supreme Court cases."

The focus on the potential or historical view of navigability, rather than the present actual use, has also been acknowledged in *Sanders v. Placid Oil Co.,* 861 F.2d 1374 (5th Cir. 1988). The Fifth Circuit cited *Finneseth* with approval for the proposition that reference to Army Corps permit requirements was significant in finding navigability. The same focus has been adopted by district courts within the Second and Fourth Circuits. *See, Sawczyk v. United States Coast Guard,* 499 F. Supp. 1034 (W.D.N.Y. 1980); *Hartman v. United States,* 522 F. Supp. 114 (D.S.C. 1981).

The Eighth Circuit, however, has taken an overly restrictive view of navigability. Essentially, the Eighth Circuit takes a snapshot of commerce at the instant of the event and uses the existence or non-existence of interstate commerce at that moment as the test for navigability. In setting forth its test, the Eighth Circuit, in *Three Buoys,* acknowledges the criticisms of its test by the Sixth Circuit and invites this Court's guidance:

> "Thus, despite the criticisms expressed in *Finneseth v. Carter,* 712 F.2d 1041, 1045 (6th Cir.

> 1983), and until Supreme Court authority to the contrary, *Livingston* [*Livingston v. United States*, 627 F.2d 165 (8th Cir. 1980), *cert. den.* 450 U.S. 914 (1981)] remains controlling authority in this court for the determination of what is a navigable waterway. The standard is one of "contemporary navigability in fact." (note omitted) (921 F.2d 775, 778).

This Court should take this opportunity to clarify the definition of navigability in order (1) to provide the scope of coverage within the admiralty jurisdiction, (2) to give effect to the uniformity of protection to vessel owners and the predictability of results of operations for a vessel operator, and (3) to avoid an intensive fact-specific analysis for determining jurisdiction.

II. Do alternate jurisdictional bases, outside traditional admiralty jurisdiction, exist which permit a federal court to address a vessel owner's rights under the Limitation of Liability Act (46 U.S.C.Appx. §§181 *et seq.*)?

II.A.

Should federal jurisdiction related to the Limitation of Liability Act (46 U.S.C.Appx. §§181 *et seq.*) specifically granted by the Congress be broadly construed?

The Eighth Circuit disregards the explicit Congressional mandate set forth in the plain and unambiguous language of the Limitation of Liability Act. 46 U.S.C. Appx. §§181 *et seq.* The Act specifically states that it applies to *all vessels used on lakes, or rivers or in inland navigation.* 46 U.S.C.Appx. §188. The use of the disjunctive in the listing shows a clear intent to provide protection to vessel owners far more broadly than applied by the

Eighth Circuit. Had the Congress intended to limit the breadth of the scope to the waters within the Admiralty and Maritime Jurisdiction, a simple reference to those waters would have sufficed. Rather, Congress explicitly used a much broader designation of waters covered by the Limitation Act in order to effect the protection to vessel owners within the United States.

The Eighth Circuit has misconstrued and misapplied the Limitation Act by ignoring the express language of the Act and improperly focusing on the locality of the event. The subject of the Limitation Act is vessel ownership. The Act is not limited by the situs of the injury: the particular waterway. *Richardson.* The Act regulates one incident of the status of vessel ownership: the liability for damage occurring without the owner's privity or knowledge. Congress' regulatory authority is not limited or defined by the admiralty jurisdiction of the federal courts. *Kaiser Aetna v. United States,* 444 U.S. 164 (1979).

While the Limitation Act does not specify its Constitutional authority, there are several bases which have been recognized:

1. The Commerce Clause (Article I, Section 8, Clause 3);

2. The 'necessary and proper' clause (Article I, Section 8, Clause 18); and

3. The judicial power over admiralty and maritime matters (Article III, Section 2, Clause 1) (A-38).

The Limitation Act has passed Constitutional muster. This Court has explicitly held that the Congressional authority to enact the Limitation Act is "derived from the power to

regulate commerce and from the clause in the Constitution extending the judicial power to 'all cases of admiralty and maritime jurisdiction' " and the 'necessary and proper' clause. *The Hamilton,* 207 U.S. 398, 404 (1907); *Kaiser Aetna*; 3 *Benedict on Admiralty* §3, ppg. 1-29 (7th Ed. 1986). The Limitation Act is empowered pursuant to the Commerce Clause and has the breadth of application provided by the Commerce Clause. *Lord v. Steamship Company,* 102 U.S. 541 (1880); *Providence & New York S.S. Co. v. Hill Mfg. Co.,* 109 U.S. 578 (1883).

The district court correctly recognized that the 1886 Amendment (Act of June 19, 1886, C.421, §4, 24 Stat. 79) made "the Act applicable to all vessels regardless of the purposes for which they were used." (A-36). Congress amended the Act specifically to encourage competition between water-borne transportation and the railroads and to encourage ownership of inland vessels to aid ship-building industries. *See Cong. Rec.,* 49th Cong., 1st Sess. 1108, 1111 (February 3, 1886). The invocation of the Commerce Clause power extends the effect of the limitation Act "to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate commerce." *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119 (1942), cited in *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264, 282 (1981); *see also, Katzenbach v. McClung,* 379 U.S. 294 (1964); *Wickard v. Filburn,* 317 U.S. 111 (1942); *NLRB v. Jones,* 301 U.S. 1 (1937); *United States v. Darby,* 312 U.S. 100 (1941).

Once imbued with Constitutional authority, the statutes must be applied with due concern for Congressional intent. The federal courts have an "unflagging

obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). The Eighth Circuit cannot reject the grant of jurisdiction provided by 46 U.S.C.Appx. §185. Had Congress intended to limit the Act to vessels while they are exclusively within the admiralty jurisdiction, Congress could easily have so stated. Having recognized the Constitutional basis of this Act in the Commerce Clause, this Court should recognize the jurisdiction of the federal courts under 28 U.S.C. §§ 1331 or 1337 to give effect to the Congressional mandate.

The Eighth Circuit denied the essence of the Act as a Congressional Act when it concluded that the Act was merely a type of defense akin to a common state law defense. Limitation, as was recognized in the briefing in *Sisson*, is unavailable in state court. The right to limitation exists only by federal statute. The right is enforceable *only* in federal court. State courts, by statute (46 U.S.C.Appx. §185), rule of court (Rule F of the Supplemental Rules of the Federal Rules of Civil Procedure), and decisions of this Court (*Norwich Company v. Wright*, 80 U.S. (13 Wall.) 104 (1871); *Ex Parte Green (The Aloha)*, 286 U.S. 437 (1932)) are incompetent to address the owner's right to limit and cannot act *in rem*. *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207 (1927).

Congress has provided this right to vessel owners and has empowered the courts to hear litigation determining these rights under the Commerce Clause of the Constitution and have defined these rights in terms of the status of the party seeking to invoke these rights: a vessel owner. *See* 1 U.S.C. §3. With this broad definition of the authority invoked and the protection afforded, this Court should instruct the Eighth Circuit to give effect to the Limitation of Liability Act, as written.

II.B.

Does *Richardson v. Harmon*, 222 U.S. 96 (1911) recognize a jurisdictional basis for a federal court to handle a limitation action involving an accident not within the admiralty jurisdiction?

In the Court's grant of certiorari in *Sisson*, the Court specifically requested briefing of "whether or not the Court should reconsider its decision in *Richardson v. Harmon*, 222 U.S. 96 (1911)." *Sisson v. Ruby*, 497 U.S. ____, 110 S.Ct. 863 (Order of January 22, 1990). The parties and various amici curiae briefed the issue. Essentially, *Richardson* recognizes that the Limitation Act is not limited by the admiralty jurisdiction of the federal courts. Among the amici curiae were the United States of America and the Maritime Law Association of the United States. These parties addressed the purposes of the Limitation Act and the rationale in *Richardson*.

This Court found it unnecessary to address *Richardson* in its decision in *Sisson*. However, this Court can address *Richardson* in the context of this claim as noted by the Solicitor General in his amicus brief in *Sisson* wherein he stated:

> "In particular, courts have refused to apply the Limitation of Liability Act to claims arising from torts on non-navigable waters, even though such claims would seem to fall within *Richardson's* expansive interpretation of the debts and liabilities subject to the Act. n.16 (16 E.G., *In re Three Buoys Houseboat Vacations U.S.A., Ltd.*, 878 F.2d 1096 (8th Cir. 1989) . . .) *Richardson* held that the situs of a tort in relation to the traditional bounds of maritime law was irrelevant to

> the application of the Act, and its reasoning does not recognize a distinction between torts occurring on land adjoining navigable waters and those taking place elsewhere." (Brief filed April 6, 1990 for United States as Amicus Curiae Supporting Respondents).

The Maritime Law Association also addressed the purpose of the Act and of *Richardson* by stating in part:

> "If it were argued that allowing limitation for claims having no significant relationship to traditional maritime activity is unnecessary for merchant marine interests, we would point out that one purpose of the Limitation Act 'was to encourage ship-building and to induce capitalists to invest money in this branch of the industry.' *Norwich, supra,* at 121. [*Norwich Company v. Wright,* 80 U.S. (13 Wall.) 104, at 121 (1871)]. The building of recreational craft is an important segment of the 'ship-building' industry today and, as discussed below, pleasure craft are clearly included in the Limitation Act." (Brief filed March 8, 1990 for the Maritime Law Association of the United States as Amicus Curiae Supporting Petitioner).

Richardson uncouples the Limitation Act from general admiralty jurisdiction. After *Richardson,* "[p]roceedings by vessel owners to limit their liability as permitted by [the Limitation Act] are within the admiralty jurisdiction even if the claims limited against might not be sued upon in admiralty." 1 Benedict on Admiralty §225 (7th ed. 1986). See *Just v. Chambers,* 312 U.S. 383, 386 (Limitation of Liability Act "extends to tort claims even when the tort is non-maritime"); *The No. 6,* 241 F. 69

(2d Cir. 1917); *The Rochester,* 230 F. 519, 521 (W.D.N.Y. 1916); *The Irving F. Ross,* 8 F.2d 313 (D.Mass. 1923); *In re Highland Nav. Corp.,* 24 F.2d 582 (S.D.N.Y. 1927); *The Atlas No. 7,* 42 F.2d 480 (S.D.N.Y. 1930); *The Trim Too,* 39 F. Supp. 271, 273 (D.Mass. 1941); *In re Colonial Trust Co.,* 124 F. Supp. 73, 75 (D.Conn. 1954).

By contrast, the Eighth Circuit has implicitly rejected *Richardson* by holding that the Limitation Act applies only to the limit of admiralty jurisdiction on currently navigable waters. The Eleventh Circuit appears to agree. *Lewis Charters, Inc. v. Huckins Yacht Corp.,* 871 F.2d 1046 (11th Cir. 1989). Both the Eighth and Eleventh Circuits conflict with this Court's ruling in *Richardson* and with the Second Circuit and district court opinions from the First Circuit cited above. This Court should revisit *Richardson* and reassert the breadth of the Limitation Act.

Richardson holds that a vessel owner, when sued for liabilities as owner or operator of the vessel, is entitled to the protection Congress intended to provide whether traditional Admiralty jurisdiction exists or not. Three Buoys submits that this Court should reaffirm this basic holding of *Richardson* and the basic statement by the Congress by overruling the Eighth Circuit's decision.

CONCLUSION

For these reasons, this petition for certiorari should be granted. In the alternative, this Court should summarily reverse the decision of the United States Court of Appeals for the Eighth Circuit and the matter should be remanded to the district court for appropriate disposition.

Respectfully submitted,

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90-1487

No. (2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD.,
Petitioner,

vs.

HARVEY G. MORTS, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2436

In the Matter of the
Complaint of Three Buoys
Houseboat Vacations U.S.A.
Ltd., as owners of one 1977
Chriscraft 20' fiberglass
vessel, Vessel No. Mo-3136-AT,
for exoneration from or
limitation of liability,
Appellant,

v.

Harvey G. Morts,
Appellees.

Appeal from the United States
District Court for the Eastern
District of Missouri.

Submitted: March 15, 1989
Filed: December 21, 1990

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

After our original opinion in this case, *Three Buoys Houseboat Vacations U.S.A., Ltd. v. Morts*, 878 F.2d 1096 (8th Cir. 1989), was decided, the Appellant applied for certiorari. The Supreme Court granted certiorari, vacated the opinion, and remanded the case for our consideration in view of *Sisson v. Ruby*, 110 S. Ct. 2892 (1990). *Three Buoys Houseboat Vacations U.S.A., Ltd. v. Morts*, 110 S. Ct. 3265 (1990).

We have examined *Sisson* and its Seventh Circuit antecedent, *In re Complaint of Sisson*, 867 F.2d 341 (7th Cir. 1989), and reexamined this case. We find no reason to alter our earlier judgment, except to the extent that it can be said to have relied on the Seventh Circuit's opinion in *Sisson*, which has been reversed.

I. BACKGROUND

Three Buoys (the Appellant) is in the business of chartering houseboats on the Lake of the Ozarks in Missouri. In the early morning hours of August 2, 1987, a service vessel of Appellant's was sent out on a service call to one of its chartered houseboats. En route, the service boat struck a houseboat that was not chartered from Appellant. Two passengers on the stricken houseboat were killed, three others incurred personal injuries, as did one of Appellant's employees. The Appellant's service vessel sank.

Various claims for wrongful death, personal injury, and property damage were filed against the Appellant and its sunken vessel in the state courts of Missouri. Seeking to avoid full liability, Appellant petitioned the district court[1] for the protections of the Limitation of Liability Act, 46 U.S.C. App. §§ 181 et seq. (the Act).[2] The Act would allow recovery against the appellant only in the amount of the salvage value of Appellant's vessel (likely nothing, as it lies at the bottom of Lake of the Ozarks) or $420 per ton. 46 U.S.C. App. 183(b) (1988).

The district court concluded that it lacked admiralty jurisdiction, but found that it had jurisdiction under general federal question jurisdiction. However, it ultimately dismissed Appellant's petition for failure to state a claim. The district court found that the Act could only

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[1] The Honorable John F. Nangle, Chief United States District Judge for the Eastern District of Missouri. The published opinions of the district court are at 689 F. Supp. 958 (E.D. Mo. 1988) and 691 F. Supp. 182 (E.D. Mo. 1988). Judge Nangle has since assumed senior status.

[2] For a discussion of the traditional scope and purpose of the Act see *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417-18 (8th Cir. 1979).

support claims arising from navigable waterways and that the Lake of the Ozarks was not navigable. Thus, the Appellant had not stated a claim. We affirm the district court, but find no subject matter jurisdiction. We again conclude that neither this court nor the district court had jurisdiction under admiralty jurisdiction, federal question jurisdiction, or the Act to entertain this suit.

II. DISCUSSION

A. *SISSON*'S IMPACT

Admiralty jurisdiction as to torts requires locality (the situs of the waterway) and nexus (the status of the vessel or activities). Locality is satisfied by a navigable waterway, while nexus is satisfied by a sufficient relationship of the vessel to maritime activities. *See Sisson*, 110 S. Ct. at 2895. While this case and *Sisson* both concern admiralty jurisdiction in the federal courts, each addresses a different aspect of that jurisdiction. Most importantly, they involve two very different waterways: *Sisson* involved Lake Michigan, indisputably a navigable waterway; this case involves the Lake of the Ozarks in Missouri, which we view as not a navigable waterway.

Further, while *Sisson* delineates admiralty's nexus requirement by explaining the meaning of maritime activities on navigable waterways, it says nothing about what actually constitutes a navigable waterway. That Lake Michigan is a navigable waterway is beyond doubt and was not discussed by the Court. The Lake of the Ozarks, however, is another cup of tea. This case turns only on the question of whether that lake is a navigable waterway for admiralty jurisdiction purposes.

In that regard, the Appellant t has urged upon us the Supreme Court's language from *Sisson* to the effect that navigation is not required to establish a connection to maritime activities — indeed, the vessel is *Sisson* was docked at a marina on Lake Michigan, and was not navigating. Nevertheless, the court found that the mooring of a ship on a *navigable waterway* was sufficiently related to maritime activities to trigger admiralty jurisdiction. *Sisson*, 110 S. Ct. at 2897-98. Thus, the nexus requirement has become rather easily satisfied, and rightly

so. It is the navigable waterway question (something of a given with respect to Lake Michigan) that seems more controlling and perhaps the one true determinant of admiralty jurisdiction. *See Sisson*, 110 S. Ct. at 2898-02 (Scalia, J., concurring).

Yet, the Appellant has ignored the distinction between navigation vis-a-vis the vessel and vis-a-vis the waterway. The whole significance of a waterway as navigable as a precondition to maritime jurisdiction seems lost to the Appellant. In *Sisson*, the Supreme Court said that navigation was not an essential element of the activities of the *vessel* to tie into maritime activities, but navigation as to the *waterway* was not discussed at all. While a vessel may not have to be navigating to be considered engaged in maritime activity, it must be on a navigable waterway. As Justice Scalia suggests, it is the very fact that a vessel is on a navigable waterway at all that creates maritime jurisdiction, and less so the activity of the vessel. *Id.* at 2901. Answering the question of the vessel's relationship to maritime activities does not answer the question of the waterway's status as navigable.

The two ideas are distinct — there is the waterway and there is the vessel and its activities. While the Appellant has suggested we deny this distinction and use the Supreme Court's analysis of navigation in the nexus-vessel context in our analysis of what is a navigable waterway, we cannot do so. The importance of the existence of a navigable waterway in the first instance is repeatedly brought home by the Supreme Court's recurrent use of the phrase "navigable waterway" to describe admiralty jurisdiction throughout its opinion in *Sisson*.[3] Hence, we remain confident that our inquiry must first determine if the Lake of the Ozarks is a navigable waterway. Because the Supreme court has not discussed that factor in *Sisson*, we readopt our views as expressed in the original panel opinion and briefly reiterate them below.

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[3] As noted in *Sisson*, "[t]he fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce,' [*Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982)], and we have said that that interest cannot be fully vindicated unless '*all* operators of vessels on navigable waters are subject to uniform rules of conduct,' *id.*, at 675, 102 S. Ct., at 2658." *Sisson*, 110 S. Ct. at 2898.

B. NAVIGABILITY

Navigability is a term subject to different definitions depending upon the context of a case. In some cases the term has a different meaning from that expressed in admiralty cases. *See Kaiser Aetna v. United States*, 444 U.S. 164, 170-172 and n. 7 (1979); *Livingston v. United States*, 627 F.2d 165, 169-70 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); *cf. Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 621-23 (8th Cir. 1979) (defining navigable waters for purposes of certain acts of Congress). While there is ample case law describing navigability in contexts which do not concern admiralty, we are concerned with navigability only as it relates to admiralty. *Livingston* is the most complete statement from this court in that regard.

Thus, despite the criticisms expressed in *Finneseth v. Carter*, 712 F.2d 1041, 1045 (6th Cir. 1983)[4], and until the Supreme Court authority to the contrary, *Livingston* remains the controlling authority in this court for the determination of what is a navigable waterway. The standard is one of "contemporary navigability in fact." *Livingston*, 627 F.2d at 170; *see also Edwards v. Hurtel*, 717 F.2d 1204, 1205 (8th Cir. 1983) (per curiam), *opinion on rhr' g*, 724 F.2d 689 (1984) (per curiam); *cf. Goodman v. 1973 26 Foot Trojan Vessel*, 859 F.2d 71, 73 and n.3 (8th Cir. 1988) (in admiralty contract case as distinguished from admiralty tort cases, court said "[n]avigable waters have a present capacity to sustain commercial shipping.") (Citing *Livingston*, 627 F.2d at 170).

The Appellant suggests there is contrary authority from this court in *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306 (8th Cir. 1957) and *George v. Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968). We do not

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[4] *Finneseth* is not actually contrary to *Livingston*, for *Finneseth* deals with a manmade lake formed by a lockless dam, but the "Dale Hollow Lake is an interstate water body susceptible or capable of being used as an interstate highway of commerce, even though it is not presently so used, it meets the Supreme Court's requirements for navigability for admiralty jurisdiction under 28 U.S.C. § 1331(1) and 46 U.S.C. § 740." *Finneseth*, 712 F.2d at 1047.

entirely agree. Neither case directly addressed the admiralty jurisdiction question answered in *Livingston*. *Livingston*, 627 F.2d at 168 and n.4. Thus, Appellant's reliance on those cases, particularly *Loc-Wood*, cannot help answer the question of what navigability is, which question controls this case.

George contains language to the effect that if a river was navigable prior to the construction of a dam, it is thereafter still considered to be a navigable waterway. *George*, 402 F.2d at 978. That language, however, is dictum and did not control on the real question necessary for resolution of the case: whether float fishing on the stream in question constituted commerce as to make the stream navigable. *Id.* To the contrary, the *George* court actually used the navigability in fact test to reach its conclusion that float fishing alone did "not render the stream navigable in fact[.]" *Id.* at 981. Further, *George* pointed out that the navigability in fact standard is an old one, dating back to *The Daniel Ball*, 77 U.S. (10 Wallace) 557 (1870).

> 'The test of navigability has frequently been stated by this Court. In the Daniel Ball . . . the Court said: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." '

George, 402 F.2d at 980 (quoting *United States v. State of Utah*, 283 U.S. 64, 76 (1931) (quoting *The Daniel Ball*, 77 U.S. (10 Wallace) at 563)). Thus, *George* and *Livingston* are not inconsistent. The latter is in some sense simply a more recent statement of the law expounded upon in the former. But *Loc-Wood* is a more troublesome case.

Loc-Wood makes the unequivocal statement that the Lake of the Ozarks is a navigable waterway. *Loc-Wood*, 245 F.2d at 307. However, *Loc-Wood* did not directly decide the question of what is navigable and what is not and only summarily addressed the issue. The precedents on which it relies say only that navigable waterways are within the admiralty jurisdiction of the federal courts, but say nothing

of what is navigable and what is not. *See Southern S.S. Co. v. NLRB*, 316 U.S. 31, 41 (1942); *The Propeller Genesee Chief of Fitzhugh*, 53 U.S. (12 How.) 443, 456-57 (1851). Nevertheless, the clear statement that the Lake of the Ozarks is navigable remains an obstacle to the decisionmaking necessary to this case. And while *Georgia* and *Livingston* could apply the correct standard of navigability without facing that language because those cases dealt with other waterways, we cannot apply the correct standard without squarely facing down *Loc-Wood*'s conclusion as to the Lake of the Ozarks.

This court is back on the same body of water, but now rides the waves of intervening precedent. To the extent that *Loc-Wood* is in conflict with *Livingston*, we are faced with a choice of precedent. We follow *Livingston* as the better reasoned authority. *Loc-Wood* did not discuss the relevant (or any) legal standards on navigability later discussed by this court in *George* and *Livingston*. Our conclusion, with the advantage of hindsight and *Livingston*'s authority, is that *Loc-Wood* was wrongly decided. To the extent that it is inconsistent with *Livingston*, is precedent for the proposition that the Lake of the Ozarks is a navigable waterway, and for the reasons discussed below, *Loc-Wood* is expressly overruled.[5]

Thus, we are faced with deciding whether the Lake of the Ozarks is a navigable waterway under *Livingston*'s navigable in fact standard. We conclude that it is not for two related reasons. First, the Lake of the Ozarks is not navigable in fact because of the existence of the Bagnell Dam. Neither the possibility of future navigation in the event the Army Corps of Engineers removes the dam nor the prior alleged navigability of the Osage River before the existence of the dam alters the present facts. The lake cannot be negotiated past the dam. *Present* navigability is the standard, and present navigability, as we construe it for admiralty and like purposes, is not possible on the Lake of the Ozarks. Second, we conclude that the purely intrastate shipping which can be maintained on the lake, which is located entirely in the State of Missouri,

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[5] As a matter of court procedure, a panel cannnot overrule a prior panel opinion of this court. For that reason, this opinion has been circulated to the court *en banc*, and the court *en banc* has approved it.

is insufficient to make it a navigable waterway for interstate commerce purposes to sustain admiralty jurisdiction in the federal courts.[6] No jurisdiction lies under 28 U.S.C. § 1333 (admiralty, maritime, and prize cases).

Likewise, we conclude that the Act does not create independent jurisdiction in the federal courts by "arising under" federal law under either 28 U.S.C. § 1331 (federal question) or § 1337 (commerce, et al.) (1988). Federal question jurisdiction is not created by the existence of the Act. The Act is really in the nature of a defense, it did not create Appellees' causes of action for personal injury and wrongful death against Appellant. The laws of Missouri are the source of those causes of action; while here the Appellant is attempting to misuse the Act to defeat what could be liability coupled with substantial damages, without the redeeming feature of encouraging maritime commerce on the high seas and navigable waterways. No independent federal question jurisdiction lies because of the Act. Further, the failure of navigability on the Lake of the Ozarks for purposes of maritime law submarines the theory of the Appellant's that the Act can create independent federal question jurisdiction for the reasons discussed below.

Finally, the Act's reach is only coextensive with that of the admiralty jurisdiction. Where admiralty jurisdiction fails for want of a navigable waterway, so does the reach of the Act. Thus, even if the Appellant discovered an independent basis for subject matter jurisdiction, it still would not be afforded the protection of the Act because the Act does not apply beyond navigable waterways. While the Act was

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[6] As to commerce, we reiterate what was first said in *George*.

> We have mentioned the trend toward liberality in the treatment of admiralty jurisdiction but we are wary of the unnecessary extension of any rule on navigability, particularly when it could well lead to *absurdity*. There are many fishing streams [and recreational lakes] throughout the country which are not usable as highways for commerce or transportation in the *customary mode*.

George, 402 F.2d at 981 (emphasis added).

amended to include vessels on inland lakes and streams, the clear intent was to include only those in navigation. *See* 46 U.S.C. § 188 (1988). The Lake of the Ozarks is not a navigable waterway for purposes of admiralty jurisdiction and thus is not navigable for purposes of the Act.

Our conclusions, now as before, are wholly consistent with the purposes of maritime jurisdiction. Maritime jurisdiction is designed to protect and promote maritime commerce by the application of uniform rules on navigable waterways. *See Sisson*, 110 S. Ct. at 2898. In the absence of a navigable waterway, there is obviously no need or authority to exercise admiralty jurisdiction or any other federal jurisdiction to give the Act reach beyond its maritime underpinnings.[7]

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[7] In fact, the application of maritime law on the Lake of the Ozarks would do nothing to promote certainty and uniformity of maritime law for those vessel operators who are elsewhere engaged in maritime commerce. To the contrary, it would no doubt come as quite a surprise to the many recreational boaters on the lake that they are part of maritime commerce subject to admiralty jurisdiction on a non-navigable body of water. *See* note 6.

We, of course, do not suggest that the character of the vessel is determinative. In *Sisson*, the vessel was a pleasure yacht. *See also Matter of Guglielmo*, 897 F.2d 58 (2nd Cir. 1990) (21-foot motorboat towing waterskier in bay off Long Island shore within Limitation of Liability Act); *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225 (11th Cir. 1990) (jet ski in waterway off Key West, Florida, within Limitation of Liability Act); *St. Hilaire Moye v. Henderson*, 496 F.2d 973, 979 (8th Cir.), *cert. denied*, 419 U.S. 884 (1974) (admiralty law does not apply only to vessels in commerce). It is the character of the waterway that first must be decided. If the waterway in question is not navigable for admiralty purposes, it makes little difference what craft sets sail.

III. CONCLUSION

Because the Lake of the Ozarks is not a navigable waterway, the facts of this case do not allow for federal jurisdiction under admiralty, federal question, or the Limitation of Liability Act. For all the foregoing reasons, we hold that the Appellant's complaint should be dismissed for want of jurisdiction, and it is so ordered.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2436

In the Matter of the Complaint of Three Buoys Houseboat Vacations, U.S.A., Ltd., etc.,

Appellant,

v.

Harvey G. Morts, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: March 15, 1989
Filed: July 5, 1989

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Three Buoys Houseboat Vacations, U.S.A., Ltd. [hereinafter Three Buoys] appeals an order of the district court[1] which dismissed its Complaint for Exoneration from or Limitation of Liability filed under the Limitation of Liability Act, 46 U.S.C. App. §§ 181 *et seq.* (Supp. I 1983). A service vessel owned by Three Buoys was involved in a

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[1] The Honorable John F. Nangle, Chief United States District Judge for the Eastern District of Missouri. The district court's opinion is published at 689 F. Supp. 958 (E.D. Mo. 1988).

collision with a houseboat on the Lake of the Ozarks, in the state of Missouri. Three Buoys filed its complaint in the district court seeking the protection provided under the Limitation of Liability Act. The district court rejected Three Buoys' assertion of admiralty jurisdiction as a basis for subject matter jurisdiction. The district court, however, concluded that it had subject matter jurisdiction under its general federal question jurisdiction. On the merits, the district court determined that the Limitation of Liability Act only applies to vessels which are used on "navigable" waterways as that term is defined for purposes of admiralty jurisdiction. The court also concluded that the Lake of the Ozarks was not navigable for this purpose. Accordingly, the district court dismissed Three Buoys' complaint for failure to state a claim. We affirm the decision of the district court.

I. BACKGROUND

On August 2, 1987, a service vessel owned by Three Buoys collided with a houseboat on the Lake of the Ozarks.[2] The Lake of the Ozarks is a large reservoir which was created when the Army Corps of Engineers constructed the Bagnell Dam impounding the Osage River. The Bagnell Dam has no locks which allow the passage of vessels. The lake created by the dam is now a popular recreational area for many Missourians and tourists. The lake is located entirely within Missouri.

The collision occurred at approximately 2:00 a.m. and resulted in the deaths of two passengers on the houseboat. Three other passengers on the houseboat and a Three Buoys employee on its service vessel sustained personal injuries. Several claims for wrongful death, personal injury, and property damage have been filed against Three Buoys and its vessel in the Missouri state courts.

Three Buoys filed its complaint in the district court seeking the protections provided under the Limitation of Liability Act, 46 U.S.C.

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[2] Three Buoys is engaged in the business of chartering houseboats on the Lake of the Ozarks. The service vessel involved in the collision was sent out to service a houseboat chartered by Three Buoys. The other vessel involved in the collision was a houseboat, although not Three Buoys' houseboat.

app. §§ 181 *et seq.* Three Buoys maintains that the district court had subject matter jurisdiction pursuant to three federal statutes. The first, 28 U.S.C. 1333, gives district courts subject matter jurisdiction to hear admiralty cases. The two remaining statutes, 28 U.S.C. §§ 1331, 1337, give the district courts subject matter jurisdiction to hear cases involving federal questions and cases arising under an act of Congress regulating commerce, respectively.

II. DISCUSSION

A. Subject Matter Jurisdiction

We begin our analysis by determining the basis for the district court's, and hence this court's, subject matter jurisdiction. As already noted, Three Buoys maintains that subject matter jurisdiction is proper pursuant to three statutes, 28 U.S.C. §§ 1333, 1331, and 1337. We will review each of these statutes to determine whether they provide a basis for subject matter jurisdiction.

Subject matter jurisdiction over admiralty cases is conferred by 28 U.S.C. § 1333 which provides in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1333 (1982).

In the early admiralty cases the extent of admiralty jurisdiction over maritime torts was determined exclusively through a locality test, *i.e.*, whether the tort occurred on navigable waters. In 1972, however, the Supreme Court added a nexus requirement for purposes of determining admiralty jurisdiction. In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972), the Supreme Court held that in order to come within the court's admiralty jurisdiction a tort must "bear a significant relationship to traditional maritime activity." We need not reach the nexus requirement in the present case because we

conclude that the collision on the Lake of the Ozarks at issue in this appeal fails the locality requirement of admiralty jurisdiction.

As already noted, it is well settled that admiralty jurisdiction only extends to torts which occur on "navigable" waters. *Id.* at 253, 93 S.Ct. at 497. Therefore, we must determine whether the Lake of the Ozarks is navigable as that term is used in the context of admiralty jurisdiction.

In *Kaiser Aetna v. United States*, 444 U.S. 164, 171-72 (1979), the Supreme Court noted some of the conflicting definitions that are often applied by the lower courts in determining whether a waterway is navigable. The confusion was attributed primarily to the four distinct purposes underlying the term "navigability" as set forth in *Livingston v. United States*, 627 F.2d 165, 169 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) which are:

> to delimit the boundaries of the navigational servitude; to define the scope of Congress' regulatory authority under the commerce clause; to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Act of 1899; and to establish the limits of federal admiralty jurisdiction. Each of these areas of the law might well require a different definition of 'navigability.'

Three Buoys argues for an expansive definition of navigable which, of course, would include the Lake of the Ozarks within its definition. In *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306, 307 (8th Cir. 1957), a case with facts somewhat similar to the instant case, this court stated: "The Lake of the Ozarks was created by the Bagnell Dam in the Osage River. The lake is entirely within the state of Missouri, but is navigable water within the admiralty and maritime jurisdiction of the United States." *See also George v. Beavark, Inc.*, 402 F.2d 977, 978 (8th Cir. 1968) ("If the river was navigable prior to construction of the dam, it continues to be considered as a navigability stream."). Three Buoys argues that because the Osage River was historically a navigable waterway prior to the construction of the Bagnell Dam, it retains its navigable waterways status notwithstanding the construction of the dam which prevents interstate travel on the Osage.

While *Loc-Wood Boat & Motors* and *George v. Beavark, Inc.* seem to provide strong support for Three Buoys' contentions, those cases were later disapproved in *Livingston v. United States*. In *Livingston*, this court suggested that navigability is not a static concept and once a waterway is found to be navigable this does not preclude a subsequent finding of nonnavigability due to a change in circumstances.

> The history of commercial traffic on the river, whatever is intrinsic interest, does not determine the scope of present-day admiralty jurisdiction. *Notwithstanding any expression to the contrary in prior decisions of this court, federal admiralty jurisdiction turns on contemporary navigability in fact.*

Livingston v. United States, 627 F.2d at 170 (emphasis added).

In *Livingston* this court indicated that the closing of waters to commercial shipping should have the effect of eliminating admiralty jurisdiction over them. *Id.* at 169. Accordingly, this court held the "concept of 'navigability' in admiralty is properly limited to describing a present capability of waters to sustain commercial shipping." *Id.* at 169-70. When this definition of navigability is applied to the facts before us it is clear that the Lake of the Ozarks, as found by the district judge, is not a navigable waterway for purposes of admiralty jurisdiction.

Because of its large size the Lake of the Ozarks is capable of sustaining commercial shipping. Nevertheless, in order to qualify as a navigable waterway for admiralty purposes we hold that purely intrastate commercial shipping is not enough. Navigability for this purpose requires interstate or foreign commercial shipping. The federal admiralty jurisdiction is founded upon the need for a uniform body of governing law with respect to navigation and commercial maritime activity. Applying uniform rules in admiralty prevents those engaged in interstate and foreign shipping from being subjected to conflicting rules of law. Such a concern is not present in the context of purely intrastate commercial shipping because only one body of law will necessarily apply and shippers will not be subjected to conflicting legal rules. Therefore we hold that the Lake of the Ozarks is not a navigable waterway and the district court properly declined to exercise its admiralty jurisdiction over this dispute.

Our decision is controlled by the *Livingston* case. At oral argument Three Buoys urged this panel to reject the reasoning of the *Livingston* case and apply a different definition of navigability. We, of course, cannot do this. A panel of this court is not at liberty to disregard prior panel decisions even when the panel may disagree with the reasoning of existing decisions. Unless intervening Supreme Court precedent has cast doubt on the reasoning of existing circuit authority, we must apply the body of circuit law that exists when we decide a given case. Only this court sitting *en banc* can disagree with or reject existing circuit authority.

The next bases for subject matter jurisdiction asserted by Three Buoys are 28 U.S.C. §§ 1331 and 1337. Both of these statutes require the cause of action over which jurisdiction is asserted to have "arisen under" federal law. The district court concluded that it had subject matter jurisdiction "pursuant to 28 U.S.C. §§ 1331 and 1337, over this limitation proceeding which arises under an Act of Congress regulating commerce." 689 F. Supp. at 963. We disagree with this conclusion.

Our research has not turned up any other case in which subject matter jurisdiction over a Limitation of Liability Act proceeding has been based on either section 1331 and 1337 in the absence of admiralty jurisdiction. The Limitation of Liability Act has been considered by the federal courts for almost one hundred-fifty years, yet no reported decisions have concluded that jurisdiction for such a claim may be premised under either section 1331 or 1337. This in itself is persuasive evidence that there is a flaw in Three Buoys' contentions.

We do not believe that either of these statutes confers jurisdiction on the district court because this case arose under state tort law and cannot be said to have arisen under the Limitation of Liability Act as argued by Three Buoys. In discussing whether a cause of action arises under federal law the Supreme Court recently noted that "[t]here is no 'single, precise definition' of that concept; rather, 'the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.' " *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S.

804, 808 (1986) (quoting *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 (1983)).

The Court noted, however, that "[t]he 'vast majority' of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that a ' "suit arises under the law that creates the cause of action" ' " *Merrell Dow Pharmaceuticals*, 478 U.S. at 808 (quoting *Franchise Tax Board*, 463 U.S. at 8-9 (quoting *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916))). This test, when applied to the instant facts, further supports our conclusion that this is not a case that arises under federal law. If a suit arises under the law that creates the cause of action then undoubtedly this case would arise under state law because it is state tort law that created the cause of action and defines the rights and obligations of the parties. Because the instant case does not fall within the court's admiralty jurisdiction and it is not a maritime tort it will be resolved according to Missouri state law. The fact that this case involves an issue of federal law does not alter our conclusion. There is a "long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharmaceuticals*, 478 U.S. at 813 (footnote omitted). Thus, Three Buoys' assertion of limited liability under the Limitation of Liability Act does not make this a case "arising under" federal law.

We recognize that Justice Holmes' test for determining the extent of federal jurisdiction is more useful as a test for inclusion rather than exclusion. Nevertheless, our holding is also consistent with the proper management of the federal judicial system. In *Merrell Dow Pharmaceuticals*, the Court reemphasized that "in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." 478 U.S. at 810.

We also note that the Limitation of Liability Act is more akin to a defense. In this regard the following language taken from the *Merrell Dow Pharmaceuticals* case seems especially apposite: "Under our longstanding interpretation of the current statutory scheme, the question whether a claim 'arises under' federal law must be determined by

reference to the 'well-pleaded complaint.' * * * *A defense that raises a federal question is inadequate to confer federal jurisdiction.*" 478 U.S. at 808 (quoting *Franchise Tax Board*, 463 U.S. at 9-10).

In *Franchise Tax Board* the Supreme Court discussed its earlier decision in *Skelly Oil Co v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). The Court noted that "*Skelly Oil* has come to stand for the proposition that 'if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking.' " *Franchise Tax Board*, 463 U.S. at 16 (quoting 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2767 (2d ed. 1983)). In *Skelly Oil*, the Court concluded that the Declaratory Judgment Act was not a jurisdictional statute and it did not extend the jurisdiction of the federal courts. 339 U.S. at 671-72. The Declaratory Judgment Act was found to be procedural and did not supply a new basis for subject matter jurisdiction.

In the instant case we are confronted with a similar statute. Two circuits have very recently concluded that the Limitation of Liability Act does not provide an independent source of subject matter jurisdiction. *See Lewis Charters, Inc. v. Huckins Yacht Corp*, 871 F.2d 1046 (11th Cir. 1989); *In the Matter of Sisson*, 867 F.2d 341, 348-49 (7th Cir. 1989). In *Lewis Charters*, the Eleventh Circuit stated the issue before it was whether a claim "incapable of invoking admiralty jurisdiction under section 1333 is, nonetheless, cognizable in the federal court under the Limitation of Liability Act." 871 F.2d at 1052. The Court answered this question in the negative. *Id.* at 1054. While the Limitation of Liability Act provides a defense to shipowners in certain admiralty cases, it never extended the jurisdiction of the federal courts. We conclude that if but for the availability of the Limitation of Liability Act procedure the federal claim would arise only as a defense to a state tort claim, jurisdiction is lacking.

Accordingly, we hold that subject matter jurisdiction is not conferred under 28 U.S.C. §§ 1331 or 1337 because Three Buoys' complaint does not "arise under" federal law for purposes of these jurisdiction statutes. Furthermore, whether a complaint under the Limitation of Liability Act "arises under" federal law in the absence of

admiralty jurisdiction is primarily a question of mere academic interest. Because, as we discuss later, the Limitation of Liability Act's territorial application is coextensive with the territorial reach of admiralty jurisdiction, the courts will never be faced with a case in which admiralty jurisdiction is lacking yet the Limitation Act will apply. Thus, Three Buoys has nothing to gain by persuading us that this case "arises under" federal law and is thus within our federal question jurisdiction.

B. Merits

Finally, aside from the fatal jurisdictional defect, Three Buoys would not be entitled to the relief it seeks on the merits. Three Buoys is trying to limit its liability for the collision involving its service vessel and a houseboat on the Lake of the Ozarks.

The Limitation of Liability Act provides in pertinent part: "The liability of the owner of any vessel * * * for any loss, damage, or injury by collision * * * incurred without the privity or knowledge of such owner * * * shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. app. § 183(a) (Supp. I 1983).

If the Act applies to the present case Three Buoys may escape liability for the wrongful deaths, personal injury, and property damage caused by its vessel. Under the Act the owner of a vessel may limit his liability to the value of the vessel and its freight at the conclusion of its voyage. In the present case Three Buoys' vessel is lying at the bottom of the lake and it has no value. Accordingly, if we find the Act to apply the claimants will be deprived of any remedy for Three Buoys' wrongs.[3]

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[3]Several cases have recently espoused a very unfavorable judicial attitude towards the Limitation of Liability Act. The Act is considered by many to be outmoded and the reasons for which the Act was passed have largely been replaced by the use of corporate organization and the availability of insurance. *See, e.g., Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234 (9th Cir. 1989).

Prior to its amendment, the Limitation of Liability Act did not "apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation." Limitation of Liability Act, Ch. 43, § 7, 9 Stat. 635, 636 (1851). Three Buoys argues that because the Limitation of Liability Act was amended in the late 1800's to apply to "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." Amendment to the Limitation of Liability Act, Ch. 421, § 4, 24 Stat. 79, 81 (1886), it must necessarily apply to vessels operating on the Lake of the Ozarks. Three Buoys misconstrues the nature of this amendment. This amendment was not intended to extend the territorial reach of the Limitation of Liability Act beyond the reach of admiralty and maritime jurisdiction. The amendment merely extended the Act's protections to all vessels within the court's admiralty jurisdiction, including those that were not being operated in the tidewaters. The amendment did not expand the Act's application to waters which are non-navigable for purposes of admiralty and maritime jurisdiction.

Thus, prior to its amendment the Limitation of Liability Act and admiralty jurisdiction were not coextensive. Admiralty jurisdiction extended to all navigable waters whereas the Limitation of Liability Act did not extend to rivers, lakes and inland navigation. The amendment of the Act merely extended its reach to the fullest extent of admiralty jurisdiction.

In an early case interpreting the Limitation of Liability Act the Supreme Court had this to say: "The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law." *Butler v. Boston Steamship Co.*, 130 U.S. 527, 555 (1889) (citations omitted).

> It being clear, then, that the law of limited liability of shipowners is a part of our maritime code, the extent of its territorial operation (as before intimated) cannot be doubtful. It is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends

> wherever public navigation extends — on the sea and the great inland lakes, and the navigable waters connecting therewith.

Id. at 557 (citations omitted).

Accordingly, courts have consistently limited the application of the Limitation of Liability Act to waters encompassed within the territorial domain of admiralty and maritime law.

In order to be within the reach of admiralty and maritime law, as previously noted, the waters must be navigable. Because the reach of the Limitation of Liability Act is coextensive with admiralty we will use the same definition for navigable as that which was used for admiralty jurisdiction purposes. Thus, our conclusion that Lake of the Ozarks is not navigable for admiralty jurisdiction purposes compels a conclusion that it is also not navigable for purposes of the Limitation of Liability Act.

In *Sisson*, the Seventh Circuit also interpreted the Limitation of Liability Act's territorial application to be limited to the territorial reach of admiralty jurisdiction. In addition, in the wake of the Supreme Court's recent decisions applying a nexus requirement for admiralty jurisdiction, the Seventh Circuit held that the "Limitation of Liability Act will be cognizable in admiralty only when the underlying tort has a relationship to traditional maritime activity." *In the Matter of Sisson*, 867 F.2d at 351 (footnote omitted). Thus, the Seventh Circuit has interpreted the Limitations of Liability Act to only apply to cases which meet both the locality and nexus tests under admiralty jurisdiction. Nevertheless, because the instant case fails the locality requirement we need not reach the issue decided in *Sisson*, *i.e.*, whether the nexus requirement applies to a Limitation of Liability Act proceeding. We note, however, that if the Limitation of Liability Act application is truly co-extensive with admiralty jurisdiction such a nexus requirement would seem to apply.

Three Buoys argues that the Limitation of Liability Act is an act of Congress passed pursuant to its powers to regulate interstate commerce. Therefore, Three Buoys maintains, the definition of navigable for purposes of the Limitation of Liability Act should not be the restrictive

definition used in the context of admiralty jurisdiction but rather the broad definition of navigable used in the context of the commerce clause.

As already noted, navigable has been defined in several contexts and courts must be fully aware of the purpose for which the concept was invoked in particular cases. In *Livingston*, we recognized the Supreme Court's admonition "that Congress' regulatory authority under the commerce clause is historically very broad, and the expansive definitions of navigability developed in commerce clause cases are not really appropriate in other contexts where the actual capability of a stream to support navigation is critical." *Livingston v. United States*, 627 F.2d at 169 (citing *Kaiser Aetna v. United States*, 444 U.S. at 173). In *Livingston* this court declined to invoke the broad definition of navigability often used in the commerce clause context. The *Livingston* court emphasized that "a functional analysis of 'navigability' should be employed "so that the limits of governmental authority are determined in accordance with the purposes it serves." *Livingston v. United States*, 627 F.2d at 169.

Accordingly, we hold that in the instant case the territorial application of the Limitation of Liability Act is limited to waters that are navigable in fact for purposes of admiralty jurisdiction. Because, as we have already discussed, the Lake of the Ozarks is not a navigable waterway for purposes of admiralty jurisdiction Three Buoys would not be entitled to the protections afforded under the Limitation of Liability Act.

III. CONCLUSION

We affirm the district court's dismissal of Three Buoys' complaint under the Limitation of Liability Act. Although the district court concluded that it had subject matter jurisdiction, we conclude that it did not.

The district court correctly noted that jurisdictions was not proper under its admiralty jurisdiction because the collision at issue did not occur on navigable waters. We believe that in the absence of admiralty

jurisdiction the district court lacked subject matter jurisdiction over this case because the Limitation of Liability Act does not provide an independent source of jurisdiction and this case did not "arise under" federal law for purposes of general federal question jurisdiction. The complaint, therefore, should be dismissed for want of jurisdiction and it is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2436EM

JUDGMENT

(Filed July 5, 1989)

In the Matter of the Complaint of Three Buoys Houseboat Vacations U.S.A., Ltd., etc.,

Appellant,

v.

Harvey G. Morts, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

July 5, 1989

A true Copy:

Attest:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.
Mandate Issued: 10/18/89

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2436EM

In the Matter of the Complaint of Three Buoys Houseboat Vacations U.S.A. Ltd., as owners of one 1977 Chriscraft 20' fiberglass vessel, Vessel No. MO-3136-AT, for exoneration from or limitation of liability,

Appellant,

vs.

Harvey G. Morts, et al.,

Appellees.

Order Denying Petition For Rehearing and Suggestion For Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge McMillian voted to grant the petition for rehearing en banc.

Petition for rehearing by the panel is also denied.

October 4, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-242A(1)

In the Matter of the:

Complaint of Three Buoys Houseboat Vacations U.S.A., Ltd., etc.

ORDER

(Filed June 27, 1988)

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that the motions of claimants Harvey G. Morts and Karron Lee Webb, et al. to dismiss the complaint of Three Buoys Houseboat Vacations U.S.A., Ltd. be and are granted.

IT IS FURTHER ORDERED that, to the extent that plaintiff seeks to invoke the Court's admiralty jurisdiction, plaintiff's complaint be and is dismissed for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that, to the extent that plaintiff seeks to invoke the Court's general federal question or commerce clause jurisdiction, plaintiff's complaint be and is dismissed for failure to state a claim under the Limitation of Liability Act.

IT IS FURTHER ORDERED that the injunction order entered in this action on January 26, 1988 be and is dissolved and declared to be of no effect.

IT IS FURTHER ORDERED that plaintiff's motion for an order noting defaults be and is dismissed as moot.

/s/ John Nangle
United States District Judge

Dated: June 27, 1988

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-141A(1)

In the Matter of the:
Complaint of Three Buoys Houseboat Vacations
U.S.A., Ltd., etc.

MEMORANDUM

This matter is now before the Court on claimants' motions to dismiss plaintiff's complaint for lack of subject matter jurisdiction. Two jurisdictional questions are presented in this case: (1) whether Lake of the Ozarks, a reservoir formed by Bagnell Dam and located entirely within the State of Missouri, is a "navigable" body of water within the Court's federal admiralty jurisdiction; (2) whether an action pursuant to the Limitation of Liability Act is within the Court's federal question or commerce clause jurisdiction.

I. Background.

Plaintiff Three Buoys Houseboat Vacations U.S.A., Ltd. (Three Buoys) is a Missouri corporation engaged in the business of chartering houseboats on Lake of the Ozarks. Lake of the Ozarks is a body of water in central Missouri which was created by impounding the Osage River by construction of the Bagnell Dam, a dam with no locks to allow passage of vessels. This case arises from a collision between a twenty-foot fiberglass vessel operated by an employee of Three Buoys and the Kantafordit houseboat. The collision occurred at approximately 2:00 a.m. on August 2, 1987 on Lake of the Ozarks. As a result of the collision, two passengers on the houseboat were killed, three other passengers on the houseboat and plaintiff's employee sustained personal injuries, plaintiff's vessel sank and the houseboat sustained property damages. Several wrongful death, personal injury, and property damage claims have been filed in state court against Three

Buoys and its vessel. (Plaintiff's Complaint, ¶ 10; Plaintiff's Affidavit of Mailing Notice filed March 1, 1988).

Three Buoys filed the present complaint for exoneration from or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. §§ 181 *et seq.*, to limit its liability in connection with the collision that occurred on Lake of the Ozarks. Plaintiff's complaint alleges that the Court has admiralty jurisdiction pursuant to 28 U.S.C. § 1333, or in the alternative, has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337. Plaintiff posted security and requested an order restraining and enjoining the prosecution of all suits or legal proceedings against it and issuing notice to claimants directing them to file their claims in federal court. *See* 46 U.S.C. § 185. On January 26, 1988, this Court issued a restraining order enjoining suits and issued notice to all claimants directing the filing of claims. Claimants move to dismiss plaintiff's complaint on the ground that Lake of the Ozarks is not a "navigable" body of water within the admiralty jurisdiction of this Court.

II. Admiralty Jurisdiction.

The admiralty jurisdiction of the federal district court is set forth in 28 U.S.C. § 1333, which provides in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Congress extended admiralty and maritime jurisdiction to cases arising from personal injury or property damage sustained on navigable waters in the Admiralty Jurisdiction Extension Act, which provides in pertinent part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water,

> notwithstanding that such damage or injury be done or consummated on land.

46 U.S.C. § 740.

Under the Limitation of Liability Act, a ship owner's liability for personal injury or property damage is limited to the value of the vessel and its pending freight when the loss is incurred without the owner's privity or knowledge. 46 U.S.C. § 183(a);[1] *Valley Line Co. v. Ryan*, 771 F.2d 366, 369 (8th Cir. 1985). This limitation of liability extends to "all seagoing vessels" and to "all vessels used on lakes or rivers or inland navigation." 46 U.S.C. § 188.[2] The Limitation of Liability Act was enacted to encourage investments in shipbuilding and to provide an opportunity for the complete disposition of claims against a vessel and its owner. *Just v. Chambers*, 312 U.S. 383, 385-386 (1941).

The determination of whether admiralty jurisdiction exists over a maritime tort involves a two-fold inquiry. First, the tort must occur on "navigable" waters. Second, the tort must have a "sufficient nexus" to a traditional maritime activity. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 671-674 (1982); *Complaint of Paradise Holdings*, 619 F. Supp. 21, 22-23 (C.D. Cal. 1984), *aff d*, 795 F.2d 756 (9th Cir.), *cert. denied*, 107 S. Ct. 649 (1986).

The Eighth Circuit has held that "navigability", for purposes of admiralty jurisdiction is "properly limited" to waters which have "a present capability . . . to sustain commercial shipping." *Livingston v. United States*, 627 F.2d 165, 170 (8th Cir. 1980), *cert. denied*, 450 U.S.

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[1] 46 U.S.C. § 183(a) provides in pertinent part:

> The liability of the owner of any vessel . . . for any loss, damage, or injury by collision . . . incurred, without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

[2] The Limitation of Liability Act has been supplemented by Admiralty Rules which prescribe procedural requirements for limitation proceedings. *See* Rules A and F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure.

914 (1981). *See also Land and Lake Tours, Inc. v. Lewis*, 738 F.2d 961, 963 n. 3 (8th Cir.), *cert. denied*, 469 U.S. 1038 (1984) ("present navigability in fact is the linchpin of admiralty jurisdiction"); *Edwards v. Hurtel*, 717 F.2d 1204, 1205 (8th Cir. 1983) (admiralty jurisdiction "turns on contemporary navigability in fact"). In *Livingston*, the Eighth Circuit held that no admiralty jurisdiction existed over an action arising from a death on the Norfolk River which occurred after construction of a hydroelectric dam had closed the river to commercial activity. The court found that a history of commercial activity on the Norfolk River was not determinative of admiralty jurisdiction and that the closing of the river to commercial traffic eliminated admiralty jurisdiction over the river. *Id.* at 169-170. The court explained that "absent some present or potential commercial activity, there is no ascertainable federal interest that justifies frustrating the legitimate interests of the states in providing a forum and applying their law to regulate conduct within their borders." *Id.* at 170 (*citing Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975)).

In *Cooper v. United States*, 500 F. Supp. 191 (W.D. Mo. 1980), the United States District Court for the Western District of Missouri applied the *Livingston* decision to an action arising from the death of an individual which occurred as a result of a collision of two motorboats on Lake of the Ozarks. The Court held that Lake of the Ozarks was not within the Court's admiralty jurisdiction. *Cooper*, 500 F. Supp. at 193.[3]

Plaintiff argues that Lake of the Ozark is a "navigable" body of water within the admiralty jurisdiction of this Court. Plaintiff points out that at the time that Lake of the Ozarks was construed by the Bagnell Dam, the Osage River was a navigable stream. Plaintiff relies upon *In re Wood's petition*, 145 F. Supp. 848 (W.D. Mo. 1956), *aff'd*

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[3] In *Cooper*, plaintiffs apparently conceded that the *Livingston* decision rendered Lake of the Ozarks beyond the court's admiralty jurisdiction. However, the court also stated that it was "convinced that Lake of the Ozarks is not navigable for purposes of admiralty jurisdiction." *Cooper*, 500 F. Supp. at 193.

sub nom. Loc-Wood Boat and Motors v. Rockwell, 245 F.2d 306 (8th Cir. 1957). In *Wood's Petition*, the district court held, based upon the historical navigability of the Osage River, that Lake of the Ozarks was a "navigable" body of water within the admiralty jurisdiction of the court. The decision was affirmed on appeal.

Plaintiff's reliance upon the historical navigability of the Osage River and the *Loc-Wood Board and Motors* decision is unavailing. In *Livingston*, the Eighth Circuit specifically rejected reliance upon historical navigability as a basis for establishing present admiralty jurisdiction. *Livingston*, 627 F.2d at 170. The *Livingston* court pointed out that in the *Loc-Wood Boat and Motors* decision the parties did not challenge the appropriateness of admiralty jurisdiction and the court was not "squarely faced with the question of whether current navigability in fact is required for admiralty jurisdiction." *Livingston*, 627 F.2d at 168 and n. 4. Finally, the *Livingston* court unequivocally stated that "[n]otwithstanding any expressions to the contrary in prior decisions of this court, federal admiralty jurisdiction turns on contemporary navigability in fact," not historical navigability. *Id.* at 170.

Plaintiff relies upon several regulatory and administrative determinations of navigability to support its contention that Lake of the Ozarks is a "navigable" body of water within the admiralty jurisdiction of this Court. First, plaintiff relies upon an April 9, 1981 order of the Federal Energy Regulatory Commission (FERC) issuing a license to Union Electric for the operation of the Osage project, which states that the project, Bagnell Dam, is located on the Osage River, "a navigable water of the United States." (*See Plaintiff's* Reply Memorandum, Exhibit A). Under the Federal Power Act, the FERC has authority to issue licenses for the construction of dams and other works. *See* 42 U.S.C. § 7172. Plaintiff also argues that Congress' declaration that a portion of the Osage River, at a point well upstream from Lake of the Ozarks, is not navigable, *see* 33 U.S.C. § 41, means that the portion of the Osage River containing Lake of the Ozarks is navigable. Plaintiff contends that the continued issuance of permits by the Army Corps of Engineers for construction of obstructions on Lake of the Ozarks (*see* Plaintiff's Reply, Exhibit B), also demonstrates that Lake

of the Ozarks is a "navigable" water of the United States within the meaning of 33 C.F.R. § 328.3 and 33 C.F.R. § 329.4.[4] Finally, plaintiff argues that the Coast Guard inspection of excursion vessels which carry passengers for hire on Lake of the Ozarks is further evidence of the navigability of Lake of the Ozarks.

Definitions of "navigability" for administrative or regulatory purposes are separate and distinct from judicial definitions of navigability for purposes of admiralty jurisdiction. *See Reynolds v. Bradley*, 644 F. Supp. 42, 45 (N.D.N.Y. 1986); *Wilder v. Placid Oil Co.*, 611 F. SUpp. 841, 844 (W.D. La. 1985). In *Livingston*, the Eighth Circuit cautioned that determinations of navigability must be viewed in light of the purposes for which the determinations were made, and stated the following:

> The Supreme Court has recently observed that precedent in this area must be evaluated carefully in light of " 'the *purpose* for which the concept of "navigability" was involved in a particular case'." *Kaiser Aetna v. United States*, 444 U.S. 164, 171 . . . The Court in that case identified four separate purposes underlying the definitions of "navigability"; to delimit the boundaries of the navigational servitude; to define the scope of Congress' regula-

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[4] These regulations define "waters of the United States" and "navigable waters" for purposes of defining the authority of the Army Corps of Engineers. Section 328.3 defines "waters of the United States" in pertinent part as follows:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

Section 329.4 defines "navigable waters" as follows:

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies a laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.

> tory authority under the commerce clause; to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Act of 1889; and to establish the limits of federal admiralty jurisdiction. Each of these areas of the law might well require a different definition of "navigability."
>
> In *Kaiser Aetna*, the Court noted specifically that Congress' regulatory authority under the commerce clause is historically very broad, and the expansive definitions of navigability developed in commerce clause cases are not really appropriate in other contexts where the actual capability of a stream to support navigation is critical . . . What is required in those contexts is a functional analysis of "navigability," so that the limits of governmental authority are determined in accordance with the purposes its serves.

Livingston, 627 F.2d 165, 169 (8th Cir. 1980) (citations omitted).

The administrative and regulatory determinations relied upon by plaintiff define the scope of the Army Corps of Engineers' authority over certain bodies of water and the scope of Congress' regulatory authority under the commerce clause, not the scope of judicial authority to exercise admiralty jurisdiction. Under a "functional analysis", the Court finds that the plaintiff has failed to establish that Lake of the Ozarks is presently navigable. *See Livingston*, 627 F.2d at 169, 170. The lake is impounded by the Bagnell Dam, the dam has no locks to allow passage of boats from the Osage River into the lake, and the lake lies wholly within the State of Missouri. The Court concludes that Lake of the Ozarks is presently incapable of sustaining commercial shipping and is not "navigable" for purposes of admiralty jurisdiction, and thus, is not within the admiralty jurisdiction of this Court.[5]

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[5] Because the Court has concluded that the accident did not occur on "navigable" waters, it is not necessary to reach the issue of whether the tort had a "sufficient nexus" to a traditional maritime activity. *See Foremost Insurance Co.*, 457 U.S. 668 (1982).

III. Alternative Bases of Jurisdiction.

Plaintiff argues that even if no admiralty jurisdiction exists over the limitation proceedings, the Court has federal question or commerce clause jurisdiction over this cause of action pursuant to 28 U.S.C. §§ 1331, 1337.

Plaintiff contends that the Limitation of Liability Act, an Act regulating commerce, provides its own basis for jurisdiction. Several courts have rejected the contention that the Limitation of Liability Act provides a basis for jurisdiction regardless of the navigability of the body of water involved. *See Marroni v. Matey*, 492 F. Supp. 340, 343 (E.D. Pa. 1980); *In re Builders Supply Co.*, 278 F. SUpp. 254, 256-57 (N.D. Iowa 1968); *In re Howser's Petition*, 227 F. Supp. 81, 85-86 (W.D.N.C. 1964); *In re Madsen's Petition*, 187 F. SUpp. 411, 413-14 (N.D.N.Y. 1960). These courts emphasized that the scope of the Limited Liability Act was "co-extensive" with the scope of admiralty jurisdiction. However, none of these cases addressed the precise issue presented in the present case concerning whether an action pursuant to the Limitation of Liability Act arises under federal law or an Act of Congress regulating commerce and, thus, is within the Court's § 1331 or § 1337 jurisdiction.

The power of Congress to enact the Limitation of Liability Act is "derived both from the power to regulate commerce and from the clause in the Constitution extending judicial power to 'all cases of admiralty and maritime jurisdiction'." *Old Dominion S. S. Co. v. Gilmore* (The Hamilton), 207 U.S. 398, 404 (1907); 3 *Benedict on Admiralty* § 3, p. 1-29 (7th Ed. 1986). To base jurisdiction upon § 1337, the commerce clause need not be the exclusive source of federal power involved in the statute, it need only be a significant source. *Murphy v. Colonial Federal Savings & Loan Ass'n*, 388 F.2d 609, 615 (2d Cir. 1967). *See generally* 13B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3574 (1984). The courts have held that suits under the Merchant Marine Act of 1920 (Jones Act), 46 U.S.C. § 688, which was enacted pursuant to Congress' power to regulate commerce and power to make laws necessary and proper to carry out the Court's power over admiralty and maritime cases, arise under an Act regulat-

ing commerce and are within the court's section 1337 jurisdiction. *See Ballard v. Moore-McCormick Lines, Inc.*, 285 F. Supp. 290, 295-96 (S.D.N.Y. 1968); *Richardson v. St. Charles-St. John the Baptist Bridge & Ferry authority*, 274 F. Supp. 764, 767-69 (E.D. La. 1967). The courts have likewise held that other shipping laws are within the § 1337 jurisdiction of the federal courts. *See Maritime Service Corp. v. Sweet Brokerage De Puerto Rico, Inc.*, 537 F.2d 560 (1st Cir. 1976) (Shipping and Intercoastal Shipping Acts); *Crispin Co. v. Lykes B ros. Steamship Co.*, 134 F. Supp. 704 (S.D. Tex. 1955) (Carriage of Goods by Sea Act); *see also Land and Lake Tours, Inc. v. Lewis*, 738 F.2d 961 (8th Cir.), *cert. denied*, 469 U.S. 1038 (1984) (Section 1331 jurisdiction exists over Steamboat Inspection Act claim).

The existence of commerce clause or federal question jurisdiction does not turn upon the present navigability of a body of water. *See Land and Lake Tours, Inc. v. Lewis*, 738 F.2d 961 (8th Cir.), *cert. denied*, 469 U.S. 1038 (1984). In *Land and Lake Tours, Inc.*, the Eighth Circuit held that federal question jurisdiction existed over a lake which was not presently navigable in fact, but which was navigable in its "natural and ordinary condition.: *Id.* at 964. Although Lake of the Ozarks is not currently navigable for purposes of admiralty jurisdiction, the portion of the Osage River containing the lake was navigable in its natural and ordinary condition before it was obstructed by the Bagnell Dam to form Lake of the Ozarks. Therefore, notwithstanding the lack of admiralty jurisdiction, this Court has jurisdiction, pursuant to 28 U.S.C. §§ 1331 and 1337, over this limitation proceeding which arises under an Act of Congress regulating commerce.

Having concluded that federal question jurisdiction exists over this limitation action, the Court must now determine whether the Limitation of Liability Act applies to the present case which involves a collision between vessels on on-navigable waters. Congress enacted the Limitation of Liability Act in 1851 to encourage investment in the American maritime industry. *See Matter of Sisson*, 668 F. Supp. 1196, 1198 (N.D. Ill. 1987). The focus of the statute was entirely upon commercial shipping. *See Complaint of Shaw*, 668 F. Supp. 524, 526 (S.D. W.Va. 1987). Congress recognized that many foreign countries involved in

maritime commerce maintained laws limiting the tort liability of ship owners. *Matter of Sisson*, 668 F. Supp. at 1198. Without limited liability, the American merchant marine was at a competitive disadvantage in the maritime world market. The Limitation of Liability was designed to place American maritime trade on an "equal footing" with the competing European maritime industry which already enjoyed limited liability, not to protect commerce on inland lakes. *In re Stephens*, 341 F. Supp. 1404, 1405-06 (N.D. Ga. 1965).

Plaintiff argues that the Limitation of Liability Act is not expressly limited, by its terms, to vessels on "navigable" waters, but is applicable to "all vessels" on "lakes or rivers or inland navigation." 46 U.S.C. § 188. Section 188 was amended in 1886 to make the Limitation of Liability Act applicable to "all vessels used on lakes or rivers or inland navigation." 46 U.S.C. § 188; G. Gilmore & C. Black, Jr., *The Law of Admiralty*, 843-44 (2d Ed. 1975). The earlier version of section 188 had excluded "owners of any canal boat, barger or lighter . . . used in rivers or inland navigation" from the protection of the Act. Gilmore & Black at 843-44. The amendment was designed to make the Act applicable to all vessels regardless of the purposes for which they were used, *see Petition of Liebler*, 19 F. SUpp. 829, 832 (W.D.N.Y. 1937), not to extend the Act to vessels on non-navigable waters. Professors Gilmore and Black have observed that the Limitation of Liability Act only applies when the "structure seeking the benefit of the Limitation Act qualifies as a 'vessel' " within the meaning of section 188 and "the event giving rise to the claims occurred on navigable waters within the Admiralty jurisdiction" of the court. *Id.*

The Court concludes that application of the Limitation of Liability Act is properly limited to incident occurring on waters which are "navigable" for purposes of admiralty jurisdiction and does not extend to a collision on non-navigable waters. Exercise of federal jurisdiction over this collision between two vessels on waters which lie wholly within the State of Missouri and which are closed to commercial shipping would not advance the purposes underlying the Limitation of Liability Act and would undermine the interests of the state in providing a forum for claims arising out of conduct occurring on its

internal waterways. If application of the Limitation of Liability Act was not confined to "navigable" waters, then every boat owner on every inland lake with no connection with maritime commerce would be within the reach of the limitation statute. Congress did not intend this result. Therefore, to the extent that plaintiff seeks to invoke the Court's general federal question or commerce clause jurisdiction, plaintiff's complaint is dismissed for failure to state a claim under the Limitation of Liability Act. *See* Fed. R. Civ. P. 12(b)(6); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357 at 593 (1969).

/s/ John Nangle
United States District Judge

Dated: June 27, 1988

APPENDIX G

Constitution of the United States

Article I, Section 8, Clause 3. Regulation of Commerce

[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article I, Section 8, Clause 9. Creation of Tribunals Inferior to Supreme Court

[The Congress shall have Power] To constitute Tribunals inferior to the Supreme Court;

Article I, Section 8, Clause 18. Enactment of Laws for Execution of Governmental Powers

[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article III, Section 2, Clause 1. Jurisdiction of Courts

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to all Cases of admiralty and maritime Jurisdiction; * * *

Statutes

1 U.S.C. § 3. "Vessel" as including all means of water transportation

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * *

28 U.S.C. § 1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: * * *.

33 U.S.C. § 41. Osage River, Missouri

The Osage River in the State of Missouri above the point where the south line of sections 15 and 16 in township 40 north, of range 22 west, of the fifth principal meridian, and in the county of Benton, State of Missouri, crosses said river, is declared not to be navigable stream, and shall be so treated by the Secretary of the Army and by all other authorities.

33 U.S.C. § 2001. Application (Rule 1)

(a) United States inland waters and Canadian waters of Great Lakes

These Rules apply to all vessels upon the inland waters of the United States * * *.

46 U.S.C. § 183. Amount of Liability; Loss of life or bodily injury; privited imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. § 188. Limitation of liability of owners applied to all vessels

Except as otherwise specifically provided therein, the provisions of section 182, 183, 183b-187, and 189 of this title shall apply to all

seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters.

46 U.S.C. App. § 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water * * *.

Procedural Rules

Fed. R. Civ. P. Supp. Rule A. Scope of Rules

These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

* * *

(4) Actions for exoneration from or limitation of liability.

* * *

The general rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

Fed. R. Civ. P. Supp. Rule F. Limitation of Liability

(1) Time for filing Complaint; Security. Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision

(9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for cost s and, if the plaintiff elects to give security, for interest the rate of 6 percent per annum from the date of the security.

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

(4) Notice to Claimants. Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) Claims and Answer. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

(6) Information to be Given Claimants. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for

each claimant (or if the claimant has no attorney to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if the claimant is known to have one), (c) the nature of the claim, i.e., whether the property loss, property damage, death, personal injury, etc., and (d) the amount thereof.

(7) **Insufficiency of Fund or Security.** Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

(8) **Objections to Claims: Distribution of Fund.** Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) **Venue; Transfer.** The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced

in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

Supreme Court, U.S.
FILED
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(5)

No. 90-1487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD.,
Petitioner,

vs.

HARVEY G. MORTS, et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 90-1487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD.,
Petitioner,

VS.

HARVEY G. MORTS, et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF CASE

On August 2, 1987, a 20-foot speed boat operated by an employee of Petitioner collided with a houseboat anchored on the Lake of the Ozarks. Appendix at p. A-27 (Subsequent references to the Appendix will be by page number only.) This collision killed two people and injured others. A-27.

The Lake of the Ozarks, impounded by the Bagnell Dam, lies entirely within the State of Missouri. A-12; A-27. No vessel on the Lake of the Ozarks can navigate across the state line. Nonetheless, Petitioner seeks to limit is liability to $250.00

pursuant to the federal Limitation of Liability Act (Limitation Act). 46 U.S.C. Section 183 et seq.

SUMMARY OF THE ARGUMENT

A Writ of Certiorari should not be granted because the controlling principles in this case are well-established. Landlocked, intrastate bodies of water are beyond the admiralty jurisdiction of federal courts. 28 U.S.C. Section 1333. The possibility of an independent basis for federal jurisdiction over claims under the Limitation Act is moot because the coverage of that Act is coextensive with the scope of admiralty jurisdiction.

ARGUMENT

Petitioner has attempted to create the appearance of turbulence in the calm waters surrounding the facet of admiralty law involved in this case. Two well-settled principles of admiralty law support the Eighth Circuit's determination that neither maritime jurisdiction in general nor the Limitation Act in particular applies to a landlocked body of water located entirely within a single state. First, the existence of admiralty jurisdiction is essential to a valid claim under the Limitation Act. Second, admiralty jurisdiction and, hence, the Limitation Act do not extend to landlocked, intrastate waterways. Analysis of these controlling principles demonstrates that any appearance of controversy created by Petitioner is either false or at least far removed from the non-controversial issues presented by this case.

I. Admiralty jurisdiction is essential to Limitation Act claims.

The exclusive jurisdictional basis for Limitation Act claims is the admiralty jurisdiction of the Federal Courts pursuant to 28 U.S.C. Section 1333. In *Sisson v. Ruby*, 497 U.S. ___, 111 L.Ed.2d

292, 297-298 n.1 (9190), this Court found no need to decide whether there might be an independent basis for federal question jurisdiction over such claims, since, in that case, admiralty jurisdiction did exist. However, three Circuit Courts of Appeal which have considered the issue have all refused to recognize an independent jurisdictional basis for Limitation Act claims. *Three Buoys*, at A-8; *Lewis Charters, Inc. v. Hawkins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989); *In the matter of Sisson*, 867 F.2d 341, 348-49 (7th Cir. 1989), *rev'd on other grounds* in *Sisson v. Ruby, supra*.[1] Citing *Franchise Transport v. Construction Laborers' Vacation Trust*, 463 U.S. 1 (1983), the Eighth Circuit concluded that there is no federal question jurisdiction over Limitation Act claims because such claims do not "arise under" the Limitation Act, which is in the nature of a federal defense. *Three Buoys* at A-8.

At any rate, as emphasized by the Eighth Circuit, the possibility of a non-admiralty basis for federal question jurisdiction over Limitation Act claims is purely academic in view of other Supreme Court precedent. A-8. This Court has stated that the reach of the Limitation Act is coterminous with the scope of admiralty jurisdiction:

> "It being clear, then, that the law of limited liability of ship owners is a part of our Maritime Code, the extent of its territorial operation . . . cannot be doubtful. It is necessarily *coextensive with* that of the general admiralty and maritime jurisdiction . . ."

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[1] The few District Courts which have considered the issue have generally reached the same conclusion, i.e., that 28 U.S.C. Section 1333 provides the exclusive jurisdictional basis for Limitation Act claims. *Marroni v. Matey*, 492 F. Supp. 340, 343 (E.D. Pa. 1980); *In re Builders' Supply Co.*, 278 F. Supp. 254, 256-57 (M.D. Iowa 1968); *In re Houser's Petition*, 227 F. Supp. 81, 85-86 (W.D.N.C. 1964); *In re Madsen's Petition*, 187 F. Supp. 411, 413-14 (N.D.N.Y. 1960).

Butler v. Boston & Savannah Steamship Co., 130 U.S. 527, 557 (1889) (emphasis supplied). Thus, even if there were some non-admiralty basis for federal question jurisdiction of Limitation Act claims, those claims would be beyond the scope of the Limitation Act and thus subject to dismissal under Rule 12(b)(6), Fed. R. Civ. P. *Three Buoys*, at A-19. The dearth of cases even addressing the possibility of federal question jurisdiction over Limitation Act claims reflects the mootness of this issue.

Contrary to Petitioner's contention, *Richardson v. Harmon*, 222 U.S. 96 (1911), did not permanently uncouple the reach of the Limitation Act from the scope of admiralty jurisdiction. While *Richardson* broadened the type of liability subject to exoneration under a comparable limitation law[2] to include damage to land as well as damage at sea, *Richardson* did not eliminate the fundamental requirement that the damage-causing vessel be located on navigable water. At most, *Richardson* temporarily disconnected the scope of the Limitation Act from the restrictive version of the locality test for admiralty jurisdiction in effect at that time, which placed damage to land beyond the scope of admiralty jurisdiction. 222 U.S. at 101.

Congress has long since realigned the Limitation Act with the scope of admiralty jurisdiction by expressly extending federal maritime jurisdiction to "include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land . . ." 46 U.S.C. Section 740 (enacted in 1948). This statutory extension of admiralty jurisdiction in effect codified the holding in *Richardson*. The reach of the Limitation Act, therefore, remains coextensive with the scope of admiralty

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[2] The Limitation Act involved in *Richardson*, while not identical to the statute in the present case, was construed as being "*in pari materia* with [the original version of the Limitation Act at issue in the present case] . . ." *Richardson*, 222 U.S. 103.

jurisdiction, as enlarged by 46 U.S.C. Section 740. The present case, involving an alleged tort which caused damage on water, rather than land, certainly provides no meaningful opportunity for reconsideration of the *Richardson* decision.

Petitioner's suggestion that the Limitation Act expressly applies to all waterways regardless of their navigability is similarly meritless. The Eighth Circuit correctly concluded that the purpose of the 1886 amendment of Section 188 was simply to increase the range of vessels within the coverage of the Limitation Act, and not to extend the scope of the Act beyond navigable interstate waters. *Three Buoys*, at A-20; *Accord, e.g., Marroni, supra*, 492 F. Supp. at 343; *Petition of Liebler*, 19 F. Supp. 829, 832 (W.D.N.Y. 1937).

Finally, Petitioner incorrectly argues that the scope of the Limitation Act is as sweeping as Congress' regulatory authority under the Commerce Clause of the U. S. Constitution, Art. I, Sec. 8, Cl. 3, to regulate interstate activities affecting interstate commerce. This argument confuses the broad constitutional authority for congressional enactment of the Limitation Act with the limited degree of authority which Congress actually chose to exercise via that Act. The Commerce Clause supplied constitutional authority for Congress to regulate interstate commerce by limiting vessel owners' liability. *Lord v. Goodall, Nelson & Perkins Steamship Co.*, 102 U.S. 541 (1881). There is, however, no authority for the proposition that Congress intended the Limitation Act to apply beyond the confines of admiralty jurisdiction.

The relatively contemporary interpretation of the Commerce Clause as warranting federal regulation of internal state affairs which "affect" interstate commerce was not widely accepted until long after the enactment of the original Limitation Act. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 1942); *see generally* J. Nowak, R. Rotunda, & J. Young, *Constitutional Law* (2d ed.)

146-66 (1983). The *Lord* case reflects the extremely limited view of congressional Commerce Power in vogue at the time of the Limitation Act's passage. *Lord* stressed that the Limitation Act was a constitutional exercise of Congress' Commerce Power because it did "not relate to the purely internal commerce of a [single] state . . ." 102 U.S. at 545.

It is, therefore, anachronistic to suggest that Congress passed the original Limitation Act in 1851 with the intention that the Act be applied to waterways which were not considered within the reach of the congressional Commerce Power until nearly a century later. It is no more plausible that Congress later came to intend that the Limitation Act exceed its original scope. *See Maryland Casualty Co. v. Cushing*, 347 U.S. 409 437 (1954) (Black, J., dissenting) (criticizing the Limitation Act as based on outmoded notions regarding the shipping industry and discouraging expansive interpretation of the Act). Petitioner has thus succeeded only in showing that the Limitation Act applies to all types of liability (46 U.S.C. Section 740) incurred by all types of vessels (46 U.S.C. Section 188) within the modern concept of admiralty jurisdiction. However, notwithstanding the breadth of the Limitations Act within the confines of admiralty jurisdiction, the reach of the Act remains circumscribed by the parameters of admiralty jurisdiction. *Butler, supra,* 130 U.S. at 557.

II. Admiralty jurisdiction does not extend to landlocked, intrastate bodies of water.

Other Circuit Courts of Appeal which have addressed the issue have, like the Eighth Circuit, concluded that admiralty jurisdiction does not apply to landlocked, intrastate waterways. *Chapman v. United States*, 575 F.2d 147 (7th Cir.) (en banc), *cert. denied*, 439 U.S. 393, and *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975) (both holding that reservoirs created by lockless dams wholly within a single state were not subject to federal admiralty jurisdiction); *see also Finneseth v. Carter*, 712

F.2d 1041, 1044-46 (6th Cir. 1983) (citing both *Chapman* and *Adams* with approval).[3] Such bodies of water do not satisfy "the threshold requirement" of admiralty jurisdiction: "that the water body be available as an interstate highway of commerce . . ." *Finneseth*, 712 F.2d at 1044. Landlocked waterways are not considered navigable for admiralty purposes, even if they are suitable for intrastate commerce, because by definition, they cannot support *interstate* traffic. *Id.*

Cases decided by this Court also clearly indicate that admiralty jurisdiction does not apply to landlocked waterways. The Court has observed that the term "navigability" arises in a variety of contexts and that care must be taken to consider the term in reference to the purpose for which it is being used. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979). The purpose of federal admiralty jurisdiction is to protect maritime commerce by establishing uniform rules of conduct for all navigable waterways and a uniform mode of administering those rules. *Sisson*, 497 U.S. at ____, 111 L.Ed.2d at 299; *Propeller Gennesee v. Fitzhugh*, 12 How. 443, 454 (1852). The basic rationale for admiralty jurisdiction applies with equal force to U.S. coastal waters and to inland interstate waters. *Propeller Gennesee*, 12 How. at 455. Similarly, an intrastate waterway may fall within the federal courts' admiralty jurisdiction if, by connecting with other interstate waters, it forms a continuous highway for the transportation of interstate commerce. *E.g., Perry v. Haines*, 191 U.S. 17 (1903). However, no such purpose would be served by extending admiralty jurisdiction to landlocked intrastate waters,

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[3] District Courts have also generally concluded that admiralty jurisdiction does not extend to intrastate bodies of water. *E.g., Reynolds v. Bradley*, 644 F. Supp. 42 (N.D.N.Y 1986); *Oseredzuk v. Warner Co.*, 354 F. Supp. 453 (E.D. Pa. 1972), *cert. denied* in 415 U.S. 977; *In the matter of Stephens*, 341 F. Supp. 1404 (N.D. Ga. 1965).

which are by definition physically incapable of sustaining interstate commerce. *See Nelson v. Leland*, 63 U.S. 48, 56 (1860) (admiralty jurisdiction "applies to all navigable waters *except to a commerce exclusively within [a single] State.*") (emphasis supplied).

With the exception of the two Eighth Circuit cases now disavowed or at least discredited by that Court,[4] none of the cases cited by Petitioner holds or even implies that admiralty jurisdiction extends to landlocked, intrastate waterways such as Lake of the Ozarks. The waterways involved in each of the cases on which Petitioner relies were, in fact, interstate or part of a continuous waterway for the transportation of interstate commerce. *Sanders v. Placid Oil Co.*, 861 F.2d 1374, 1378 (5th Cir. 1988) (Lake Catahoula, in conjunction with connection rivers, formed "a continuous highway between states over which commerce can be conducted."); *Hartman v. United States*, 522 F. Supp. 114, 116-17 (D.S.C. 1981) ("Lake Wylie is an interstate body of water, comprising a portion of the border between the two Carolinas."); *Sawczyk v. U. S. Coast Guard*, 490 F. Supp. 1034, 1039 (W.D.N.Y. 1980) ("The Niagra River . . . forms an international boundary between the United States and Canada along its entire length of about 36 miles."). The issue in these cases was whether the concededly interstate bodies of water

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[4] These cases are *George v. Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968) and *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306, 307 (8th Cir. 1957). Both suggest that the construction of a lockless dam confining formerly interstate water to a single state does not remove that waterway from the ambit of admiralty jurisdiction. *George*, 402 F.2d at 978; *Loc-Wood*, 245 F.2d at 307. In *Three Buoys*, the Eighth Circuit distinguished *George* on the grounds that any such implication was mere dictum in that case. *Three Buoys* at A-6. The Eighth Circuit expressly overruled *Loc-Wood*, which had held that the Lake of the Ozarks continued to be navigable after construction of the Bagnell Dam. *Id.*, at A-7.

involved were navigable in the sense of being capable of sustaining commercial traffic. *Id.* No such issue arises in the present case since the Lake of the Ozarks fails the "threshold" test for maritime navigability: it simply is not interstate water. *Finneseth, supra*, 712 F.2d at 1044.

Petitioner's contention that the Lake of the Ozarks remains within admiralty jurisdiction merely because it once formed part of the interstate Osage River is altogether unconvincing. Historical navigability is immaterial to admiralty jurisdiction's purpose of promoting interstate commerce through the establishment of uniform rules for interstate and international waters. *Kaiser Aetna, supra*, 444 U.S. at 171; *see also Sisson, supra*, 111 L.Ed.2d at 299; *Propeller Gennessee, supra*, 12 How. at 459. Extending admiralty jurisdiction to the indefinitely landlocked waters of the Lake of the Ozarks would contribute absolutely nothing to the uniformity of rules of conduct and procedure applicable to waterways available for interstate and international commerce. The Eighth Circuit, therefore, properly focused on the long-standing non-navigability of the Lake of the Ozarks, rather than the Lake's history as part of the interstate Osage River.[5]

Concentrating on the current non-navigablity of landlocked waterways such as the Lake of the Ozarks will not require overly

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[5] The retained Federal authority over the Lake of the Ozarks derives from Congress' Commerce Power, rather than admiralty jurisdiction. The Commerce Clause permits Congress to regulate formerly interstate waterways which may regain their interstate status. *Economy Light and Power Co. v. United States*, 256 U.S. 113 (1920); *see also* 33 C.F.R. Section 329.4 (granting the Army Corps of Engineers authority over "navigable waters," including "those waters that . . . have been used in the past . . . to transport interstate or foreign commerce . . ."). However, for the reasons discussed in the text, the Federal government's retention of regulatory authority over landlocked waterways does not mean that those waterways remain subject to admiralty jurisdiction.

fact-intensive analysis, as Petitioner suggests. As noted by one Court, determination that intrastate waterways are beyond the scope of admiralty jurisdiction requires little more than "common sense." *In re Madsen's Petition*, 187 F. Supp. 411, 414 (N.D.N.Y. 1960) (citing *Peak v. United States*, 353 U.S. 43, 46, for the observation that "common sense often makes good law.") In the present case, the Eighth Circuit applied both common sense and good law by holding that Federal law does not severely curtail the State remedies available to Missouri residents injured through the allegedly tortious conduct of a Missouri corporation on a body of water located entirely within the State of Missouri.

CONCLUSION

For all of the foregoing reasons, Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(6)

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In the Supreme Court of the United States

OCTOBER TERM, 1991

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD., PETITIONER

v.

HARVEY G. MORTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. 1333(1), which confers admiralty and maritime jurisdiction on the district courts, extends to an artificial lake that is presently incapable of sustaining interstate commercial navigation.

2. Whether the Limitation of Liability Act, 46 U.S.C. App. 181 *et seq.*, applies to claims over which the federal courts would not otherwise exercise admiralty and maritime jurisdiction.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner is in the business of chartering houseboats on the Lake of the Ozarks, which lies entirely within the State of Missouri. The Lake of the Ozarks consists of waters of the Osage River (a tributary of the Missouri River) that are impounded by the Bagnell Dam. Because the Bagnell Dam has no locks, commercial vessels do not pass from the Lake of the Ozarks to waters outside Missouri. Pet. App. A12, A15.

On August 2, 1987, one of petitioner's service vessels, a 20-foot fiberglass boat, collided with a houseboat on the Lake of the Ozarks. Two occupants of the houseboat were killed; three other occupants of the houseboat and

one of petitioner's employees were injured; and petitioner's service boat sank. Respondents filed actions against petitioner and its service vessel in Missouri state courts, seeking recovery for wrongful death, personal injury, and property damage. Pet. App. A2, A12.

2. Petitioner then commenced this action in the United States District Court for the Eastern District of Missouri. The complaint alleged that, under the Limitation of Liability Act, 46 U.S.C. App. 181 *et seq.*, petitioner's liability to respondents was limited to the value of the sunken service vessel.[1] The complaint alleged that the district court had subject matter jurisdiction under 28 U.S.C. 1333(1), the statutory grant of federal admiralty jurisdiction; 28 U.S.C. 1331, the grant of general federal question jurisdiction; and 28 U.S.C. 1337, which confers federal jurisdiction over actions "arising under any Act of Congress regulating commerce."

The district court dismissed the action. Pet. App. A27-A37. It first addressed the availability of admiralty jurisdiction. The court noted that, under the Eighth Cir-

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[1] Under specified conditions, the Limitation of Liability Act provides that "[t]he liability of the owner of any vessel" for damage or losses arising from a casualty involving the vessel shall not "exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. App. 183. A shipowner seeking the benefit of the Act files a petition to limit its liability in a federal district court. 46 U.S.C. App. 185. Upon the filing of a petition, the Act mandates procedures analogous to those of a bankruptcy proceeding. All persons with claims against the owner or the vessel receive notice of the limitation proceeding and are admonished to file their claims in that proceeding. The district court is authorized to stay all other litigation on such claims. When there are multiple claims against the vessel owner and the value of the claims exceeds the value of the vessel, the federal court adjudicates whether the owner is entitled to limit its liability under the Act and the extent to which the owner is liable to each claimant. If the owner is found to be entitled to the benefit of the Act, the value of the vessel is apportioned among the successful claimants. See 46 U.S.C. App. 185; Fed. R. Civ. P. Supp. F(3); 3 A. Jenner, E. Flynn & J. Loo, *Benedict on Admiralty* §§ 51-52 (7th ed. 1990).

cuit's decision in *Livingston* v. *United States*, 627 F.2d 165, 170 (1980), cert. denied, 450 U.S. 914 (1981), admiralty jurisdiction was dependent upon "contemporary navigability in fact." See Pet. App. A31. Finding that the Lake of the Ozarks is presently incapable of sustaining interstate commercial navigation, the district court concluded that the Lake of the Ozarks "is not 'navigable' for purposes of admiralty jurisdiction, and thus, is not within the admiralty jurisdiction." *Id.* at A31, A33.

The district court next concluded that 28 U.S.C. 1331 and 1337 did confer subject matter jurisdiction over the action, reasoning that the case arose under the Limitation of Liability Act, a statute that the court found to have been enacted pursuant to the Commerce Clause. Pet. App. A34-A35. The court concluded, however, that the Limitation of Liability Act "is properly limited to incidents occurring on waters which are 'navigable' for purposes of admiralty jurisdiction and does not extend to a collision on non-navigable waters." *Id.* at A36. Thus, the court held, the complaint failed to state a claim on which relief could be granted. *Id.* at A37.

3.a. The Eighth Circuit affirmed the dismissal of the action. It held that the district court lacked subject matter jurisdiction and, in the alternative, that the Limitation of Liability Act was not applicable to waters outside the scope of admiralty jurisdiction. Pet. App. A11-A23. Like the district court, the court of appeals found that the reasoning of *Livingston* v. *United States*, 627 F.2d at 170, foreclosed admiralty jurisdiction. Although "the Lake of the Ozarks is capable of sustaining commercial shipping," the court explained, navigability for purposes of admiralty jurisdiction "requires interstate or foreign commercial shipping." Pet. App. A15.[2]

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[2] The court observed that although *Loc-Wood Boat & Motors* v. *Rockwell*, 245 F.2d 306, 307 (8th Cir. 1957), and *George* v. *Beavark, Inc.*, 402 F.2d 977, 978 (8th Cir. 1968), "seem to provide strong support for [petitioner's] contentions," those decisions were effectively overruled in *Livingston*. Pet. App. A15. (*Loc-Wood* stated

The court of appeals also held that 28 U.S.C. 1331 and 1337 did not confer federal jurisdiction over this action, because the action "arose under state tort law and cannot be said to have arisen under the Limitation of Liability Act." Pet. App. A16. The court explained that the action would be "resolved according to Missouri state law" and that, for purposes of jurisdiction, "the Limitation of Liability Act is * * * akin to a defense." *Id.* at A17. The court found further support for its conclusion in decisions from other circuits holding that the Limitation of Liability Act "does not provide an independent source of subject matter jurisdiction." *Id.* at A18.

Finally, the court concluded that even if Section 1331 or Section 1337 provided jurisdiction, "the territorial application of the Limitation of Liability Act is limited to waters that are navigable in fact for purposes of admiralty jurisdiction." Pet. App. A22. The court rejected petitioner's contention that an 1886 amendment to the Act, extending it to "all vessels used on lakes or rivers or in inland navigation," 46 U.S.C. App. 188, warranted a different conclusion. Noting that the Limitation of Liability Act had excluded inland navigation when first enacted in 1851, the court determined that the 1886 amendment "merely extended the Act's protections to all vessels within the court's admiralty jurisdiction, including those that were not being operated in the tidewaters." Pet. App. A20. The amendment did not, the court continued, "expand the Act's application to waters which are non-navigable for purposes of admiralty and maritime jurisdiction." *Ibid.*

b. Petitioner filed a petition for certiorari. This Court granted the petition, vacated the court of appeals' judgment, and remanded for further consideration in light of *Sisson* v. *Ruby*, 110 S. Ct. 2892 (1990). 110 S. Ct.

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that the Lake of the Ozarks was navigable for purposes of admiralty jurisdiction.) In its later opinion in this case, the court overruled *Loc-Wood*. See note 4, *infra*.

3265 (1990). On remand, the court of appeals again affirmed. Pet. App. A1-A10.

The court noted that *Sisson* confirmed that "[a]dmiralty jurisdiction as to torts requires locality (the situs of the waterway) and nexus (the status of vessel or activities)." Pet. App. A3. *Sisson*, the court of appeals continued, addressed the nexus prong and said "nothing about what actually constitutes a navigable waterway." *Ibid.* Accordingly, the court reiterated its determinations that the Lake of the Ozarks is not navigable for purposes of admiralty jurisdiction; that federal jurisdiction is also unavailable under 28 U.S.C. 1331 and 1337; and that the Limitation of Liability Act is coextensive with admiralty jurisdiction. Pet. App. A5-A9.[3]

DISCUSSION

In our view, the court of appeals was correct in concluding that neither general federal admiralty jurisdiction nor the Limitation of Liability Act extends to the Lake of the Ozarks because it is presently incapable of sustaining interstate commercial navigation. There is no conflict among the courts of appeals that warrants this Court's review. Further, although the lower courts' reasoning is potentially inconsistent with a broad reading of *Richardson* v. *Harmon*, 222 U.S. 96 (1911), we do not believe that the inconsistency need be resolved in this case.

1. Under the Constitution, the judicial power extends "to all Cases of admiralty and maritime Jurisdiction." U.S. Const. Art. III, § 2, Cl. 1. Congress in turn has granted the district courts exclusive jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which

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[3] The panel overruled *Loc-Wood* to the extent that it was inconsistent with *Livingston*; the panel noted that it had circulated the opinion to the full court and had received approval for that action. Pet. App. A7 & n.5.

they are otherwise entitled." 28 U.S.C. 1333(1). Tort claims must satisfy two requirements to fall within this jurisdiction. The tort must occur "upon the high seas or navigable waters," *Sisson* v. *Ruby*, 110 S. Ct. 2892, 2895 (1990), and it must bear "a substantial relationship to traditional maritime activity," *id.* at 2897-2898.[4] This case concerns the first requirement: the nature of the "navigable waters" to which admiralty jurisdiction extends.

a. Until the mid-1800s, admiralty jurisdiction was limited to the tidewaters—the high seas, salt water ports, and those inland waterways affected by the ebb and flow of the tide. *Waring* v. *Clarke*, 46 U.S. (5 How.) 441, 464 (1847). See *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825). The justification for that limitation was purely historical. At the time of the Revolution and the ratification of the Constitution, the jurisdiction of English admiralty courts was limited by the tidewater doctrine, and nearly all of the significant navigable waters in the original 13 States were tidewaters. See *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, 455 (1852).

The growth of commercial maritime activity on the Mississippi and the Great Lakes exposed the artificiality of the tidewater doctrine. It made no practical sense to have admiralty jurisdiction (and the established body of substantive maritime law that accompanied it) stop at some arbitrary point on the Mississippi River, or to withhold that system of law from lakes that were functionally indistinguishable from the high seas. See 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .200[3], at 2072 (2d ed. 1988). Consequently, in 1845, Congress enacted a statute extending admiralty jurisdiction to a specified class of vessels engaged in interstate commerce on "the

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[4] See also *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668 (1982); *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972).

lakes and navigable waters connecting said lakes." Act of Feb. 26, 1845, ch. 20, 5 Stat. 726.

In *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) at 453-460, a case arising out of a collision on Lake Ontario, the Court upheld the 1845 statute as a valid exercise of legislative power implicit in the constitutional grant of admiralty jurisdiction.[5] The Court overruled prior cases that had limited admiralty jurisdiction to tidewaters, reasoning (*id.* at 454 (emphasis added)):

> Now there is nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor any thing in the absence of a tide that renders it unfit. *If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same.* And if a distinction is made on that account, it merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it.

Subsequent decisions filled in the broad conception of admiralty jurisdiction recognized in *The Propeller Genesee Chief*. In *Jackson* v. *The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 299-301 (1858), the Court made clear that the original statutory grant of admiralty jurisdiction, Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77, extended to all rivers navigable from the sea, without regard to the action of the tide. In *The Propeller Commerce*, 66 U.S. (1 Black) 574, 578-579 (1862), the Court held that admiralty jurisdiction extends to a tort on navigable waters regardless of whether the vessels involved are engaged in an interstate or foreign voyage. Accord *The Belfast*, 74 U.S. (7 Wall.) 624, 641-642 (1869). In *The Hine* v. *Trevor*, 71 U.S. (4 Wall.) 555, 569 (1867), the Court summarized the upshot of these decisions as

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[5] See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 360-361 (1959) (explaining the nature of the authority conferred on Congress by the constitutional grant of admiralty jurisdiction).

follows: "The admiralty jurisdiction, to which the power of the Federal judiciary is by the Constitution declared to extend, * * * covers the entire navigable waters of the United States." Accord *Insurance Co.* v. *Dunham*, 78 U.S. (11 Wall.) 1, 25 (1871). See *The Eagle*, 75 U.S. (8 Wall.) 15, 26 (1869) (holding that the 1789 statute conferred admiralty jurisdiction with respect to all such navigable waters).

b. Since *The Propeller Genesee Chief*, the principal determinant of admiralty jurisdiction has been interstate or foreign navigability "in fact." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172 n.7 (1979). The basic test is whether a body of water is currently capable of supporting interstate or international commercial navigation. *The Propeller Genesee Chief*, 53 U.S. (12 How.) at 454 (jurisdiction logically extends to "public navigable water, on which commerce is carried on between different states or nations"); *Ex parte Boyer*, 109 U.S. 629, 632 (1884) (admiralty jurisdiction extends to waters serving as "a highway for commerce between ports and places in different States").[6] Consistent with this standard, the Court has recognized that man-made improvements may open new bodies of water to interstate navigation and thereby result in an extension of admiralty jurisdiction. *Ex parte Boyer*, *supra* (admiralty jurisdiction encompasses action arising from a collision on the Illinois and Lake Michigan Canal); *The Robert W. Parsons*, 191 U.S. 17, 26-28 (1903) (there is no "distinction in principle" between "canals" and "other navigable waters"); *Marine Transit Corp.* v. *Dreyfus*, 284 U.S. 263, 271-272 (1932) (New York Barge Canal is within admiralty jurisdiction).

This case presents the reverse of the fact pattern at issue in *Ex parte Boyer*, *The Robert W. Parsons*, and *Marine Transit Corp.*, *supra*. The lower courts found

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[6] See also *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *The Montello*, 87 U.S. (20 Wall.) 430 (1874). Although these cases involved the scope of federal statutes enacted pursuant to the Commerce Clause, see *Kaiser Aetna* v. *United States*, 444 U.S. at 172, they are often cited in the context of admiralty jurisdiction.

that the Bagnell Dam has made the Osage River impassible to commercial navigation between States. Although this Court has never had occasion to consider that situation, the logic of the cases outlined above suggests that a fundamental change in the physical condition of a waterway that makes interstate commercial navigation infeasible should result in the withdrawal of admiralty jurisdiction. Admiralty jurisdiction was extended to inland waterways and canals because there was no intelligible distinction, in terms of the considerations underlying admiralty jurisdiction, between tidewaters and other interstate waterways or between artificial and natural waterways that support interstate commercial navigation. The same reasoning suggests that when a fundamental change in conditions, such as the construction of a dam, closes a waterway to interstate commercial navigation, that waterway should henceforth be afforded the same treatment as a lake whose natural features permit only intra-State commercial navigation.[7]

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[7] In *Ex parte Boyer*, 109 U.S. at 632, this Court reserved the question "whether the admiralty jurisdiction of the district court extends to waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State or in a foreign country." One commentator has questioned the logic of withholding admiralty jurisdiction from bodies of water that are capable of supporting commercial navigation within a single State. See 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .200[3], at 2076 (2d ed. 1988). But see G. Gilmore & C. Black, *The Law of Admiralty* 32-33 & n.103 (2d ed. 1975); 1 S. Friedell, *Benedict on Admiralty* § 146, at 9-16 & n.7 (rev. 7th ed. 1991). However, in *Nelson* v. *Leland*, 63 U.S. (22 How.) 48, 56 (1860), this Court indicated that interstate commercial navigation was required for admiralty jurisdiction, and the lower federal courts have repeatedly adhered to that limitation. *E.g.*, *Minix* v. *Fellers*, 654 F. Supp. 1127 (N.D. Cal. 1987); *Reynolds* v. *Bradley*, 644 F. Supp. 42, 45 (N.D.N.Y. 1986); *Reed* v. *United States*, 604 F. Supp. 1253, 1268 (N.D. Ind. 1984); *Oseredzuk* v. *Warner Co.*, 354 F. Supp. 453 (E.D. Pa. 1972), aff'd, 485 F.2d 680 (3d Cir. 1973), cert. denied, 415 U.S. 977 (1974); *In re Stephens*, 341 F. Supp. 1404 (N.D. Ga. 1965); *Doran* v. *Lee*, 287 F. Supp. 807, 809-810 (W.D. Pa. 1968); *In re Builders Supply Co.*, 278 F. Supp.

As this Court has often noted, the fundamental purpose of federal admiralty jurisdiction is the protection of maritime commerce. *Exxon Corp.* v. *Central Gulf Lines, Inc.*, 111 S. Ct. 2071, 2076 (1991); *Sisson* v. *Ruby*, 110 S. Ct. at 2898; *Foremost Inc. Co.* v. *Richardson*, 457 U.S. at 674. That jurisdiction ensures that disputes which may affect interstate or foreign maritime commerce can be resolved in a federal forum in accordance with a uniform body of federal admiralty law. See *Sisson* v. *Ruby*, 110 S. Ct. at 2896. When a body of water is no longer capable of being used as a highway for interstate or foreign maritime commerce, the basis for providing federal forum and a uniform body of admiralty law is substantially reduced. The fact that the barrier to commerce is man-made is immaterial to the justification for the jurisdiction. See 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .200[3], at 2077-2078 n.25 (2d ed. 1988).[8]

States have long prescribed laws governing those waters that fall outside the grant of admiralty jurisdiction, see *The Hine* v. *Trevor*, 71 U.S. (4 Wall.) at 561,

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254, 256-257 (N.D. Iowa 1968); *Marine Office of America* v. *Manion*, 241 F. Supp. 621 (D. Mass. 1965); *Shogry* v. *Lewis*, 225 F. Supp. 741 (W.D. Pa. 1964); *In re Madsen's Petition*, 187 F. Supp. 411 (N.D.N.Y. 1960). Whatever its merits as an original matter, the requirement of interstate or foreign navigability is too well established to warrant reconsideration at this time, at least in the absence of action by Congress. See 46 U.S.C. App. 740 (extending admiralty jurisdiction to shoreside injuries caused by vessels on navigable waters).

[8] We do not suggest that a transient feature, such as a wreck left in place for a limited period, would suffice to preclude admiralty jurisdiction. Admiralty jurisdiction extends to bodies of water that, because of natural conditions, are navigable only at certain times of the year, see *Sanders* v. *Placid Oil Co.*, 861 F.2d 1374, 1376-1378 (5th Cir. 1988), and temporary man-made obstructions would call for similar treatment. On the scale of time relevant to maritime commerce, however, the Bagnell Dam cannot fairly be considered transient. It has fundamentally altered the configuration of the waters in its vicinity, and it would require a major public works project to remove it or to create a commercial water route bypassing it.

and that law is available to resolve disputes of the sort involved in this case. Congress, of course, may exercise its authority under the Commerce Clause or other enumerated powers to prescribe federal standards on issues of national importance; any such standards would then be binding on state or federal courts.[9] Absent a present justification for admiralty jurisdiction, there is no sound reason to displace state law applicable to single-state bodies of water. See *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 272-273 (1972); *Victory Carriers, Inc.*, v. *Law*, 404 U.S. 202, 211-212 (1971).

c. There is no conflict among the courts of appeals on this question. The Ninth and Seventh Circuits have held that the admiralty jurisdiction does not extend to bodies of water that, although once used for interstate commercial navigation, have been closed by dams. *Adams* v. *Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975); *Chapman* v. *United States*, 575 F.2d 147, 151 (7th Cir.) (en banc), cert. denied, 439 U.S. 893 (1978). In this case, the Eighth Circuit has committed itself to the same approach, overruling an earlier decision, *Loc-Wood Boat & Motors* v. *Rockwell*, *supra*, that conflicted with *Adams* and *Chapman*. See notes 2, 4, *supra*. The reasoning of decisions in other circuits is also consistent with the approach applied in the instant case.[10]

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[9] "[T]here is no doubt that Congress may prescribe the rules of the road, define the conditions under which running lights shall be displayed, require the removal of obstructions to navigation, and exercise its authority for such other reason as may seem to it in the interest of furthering navigation or commerce." *Kaiser Aetna* v. *United States*, 444 U.S. at 174.

[10] See *Sanders* v. *Placid Oil Co.*, 861 F.2d at 1377-1378 (finding admiralty jurisdiction because access to lake was possible over artificial weir during a significant portion of the year); *Price* v. *Price*, 929 F.2d 131, 134 (4th Cir. 1991) (holding that admiralty jurisdiction extends to artificial *interstate* lake that is presently capable of sustaining commercial navigation); *Finneseth* v. *Carter*, 712 F.2d 1041, 1044-1045 (6th Cir. 1983) (same).

Although *Finneseth* criticized the reasoning of *Livingston*, see 712 F.2d at 1045, this case does not involve the point on which the

d. Petitioner's principal contention is that the terms of the Federal Power Act license for the Bagnell Dam, federal statutes, and decisions of this Court establish that the Lake of the Ozarks is navigable. Pet. 4-5, 10-12. Petitioner's reliance on these authorities is misplaced, however, since they do not suggest navigability *for purposes of admiralty jurisdiction.*

The concept of "navigable waters," as this Court observed in *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 (1979), is used not only to determine the scope of admiralty jurisdiction, but also "to define the scope of Congress' regulatory authority under the Interstate Commerce Clause, to determine the extent of the authority of the Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899," and "to delimit the boundaries of the navigational servitude" held by the United States. See also *Utah Division of State Lands* v. *United States*, 482 U.S. 193, 195-198 (1987) (addressing the "navigable waters" that are subject to the "equal footing" doctrine).[11] Navigability thus has different

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Sixth Circuit took issue with *Livingston*. See Pet. 13; Pet. Supp. Br. 3. In *Livingston*, the accident occurred *below* a dam on a tributary of the Mississippi River. See 627 F.2d at 166. Thus, there remained a continuous interstate water connection between the point on the tributary where the accident occurred and the sea. The Eighth Circuit held, nevertheless, that admiralty jurisdiction was unavailable because the dam had terminated commercial navigation on the tributary. (Beneath the dam, where the accident in *Livingston* occurred, the absence of commercial navigation resulted from the dam's effect on the flow of the tributary. See 627 F.2d at 168.) *Finneseth*, another case in which the body of water involved connected more than one State, noted that the stream at issue in *Livingston* "straddled" two States and criticized *Livingston* for failing to acknowledge that *potential* commercial navigation in an *interstate* waterway may sustain admiralty jurisdiction. 712 F.2d at 1045. The instant case does not present a similar issue. The lower courts assumed that *actual* commercial navigation occurs on the Lake of the Ozarks, but held that the dam made *interstate* commercial navigation impossible.

[11] It is now clear that Congress's authority under the Commerce Clause is not limited by any conception of navigability. See, *e.g.*,

meanings in different contexts; a body of water may be navigable in one sense, but not another. See *Kaiser Aetna*, 444 U.S. at 172-173. None of the exercises of federal authority on which petitioner relies purport to identify waters subject to admiralty jurisdiction.[12] There

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United States v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 426-427 (1940); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) (holding that the Clean Water Act's definition of "navigable waters," 33 U.S.C. 1362(7)), includes not only those waters that are navigable in fact, but also "nonnavigable intrastate waters whose use or misuse could affect interstate commerce").

[12] In 33 U.S.C. 41, which was enacted before the construction of the Bagnell Dam, Congress declared that the Osage River is not navigable beyond a point upstream from where the dam now lies. But this declaration of navigability relates to the Army Corps of Engineers' broad power, derived from statutes enacted pursuant to the Commerce Clause, to regulate all waters that were navigable in their natural state. See 33 U.S.C. 1 and 401; *Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 123 (1921) (recognizing, in the context of the Corps' regulatory authority, that "a river having actual navigable capacity in its natural state and capable of carrying commerce among the States, is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions"). Section 41 thus involves no legislative determination on the availability of admiralty jurisdiction. The condition in the Federal Power Act license for the Bagnell Dam—which reserves federal power to require navigational improvements or the removal of the dam—also reflects an exercise of Congress's power under the Commerce Clause to preserve the potential navigability of the Osage River. Similarly, the Coast Guard's authority over the Lake of the Ozarks also reflects a broad legislative grant of power conferred pursuant to the Commerce Clause, rather than a determination as to admiralty jurisdiction. See, *e.g.*, 14 U.S.C. 81 *et seq.* In *Land & Lake Tours* v. *Lewis*, 738 F.2d 961, 963, cert. denied, 469 U.S. 1038 (1984), the Eighth Circuit recognized that the Coast Guard may regulate maritime activity—in that case, by conducting safety inspections of vessels—on waters that are not subject to admiralty jurisdiction.

Petitioner also relies on the Act of Mar. 3, 1811, ch. 46, § 12, 2 Stat. 666. This statute, now codified at 33 U.S.C. 10, declares that "[a]ll the navigable rivers and waters in the former Territories of

is no dispute that the Coast Guard and the Corps of Engineers may properly exercise broad authority over the Lake of the Ozarks, but admiralty jurisdiction is governed by a different concept of navigability.

2. This case also raises the question whether the Limitation of Liability Act empowers federal courts to limit and resolve liabilities that would not otherwise be subject to admiralty jurisdiction. That question was also presented in *Sisson* v. *Ruby*, *supra*, but the Court ultimately did not decide it. 110 S. Ct. at 2894 n.1. We believe that the Act does not reach claims that are otherwise outside admiralty jurisdiction and, therefore, that the court of appeals was correct in its conclusion that the Act has no application to torts occurring on the Lake of the Ozarks.[13] Although that position is inconsistent with a broad reading of *Richardson* v. *Harmon*, *supra*, the lower courts have consistently declined to apply the Limitation of Liability Act to inland lakes that will not support interstate commercial navigation. In that particular context, therefore, the scope and continuing vitality of

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Orleans and Louisiana shall be and forever remain public highways." This statute asserts perpetual *federal* authority over waters brought within the Union by the Louisiana Purchase, but does not address admiralty jurisdiction.

[13] This Court has made clear that petitions filed under the Limitation of Liability Act are within the exclusive federal *admiralty* jurisdiction. *Providence & New York S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 594-595 (1883). Thus, we disagree with the district court's conclusion that a federal court may exercise general federal question jurisdiction over limitation of liability proceedings. See generally *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359-380 (1959) (admiralty claims do not arise under federal law within the meaning of statutory grant of general federal question jurisdiction). However, in *Richardson*, this Court evidently construed the Act to entail a grant of admiralty jurisdiction sufficient to encompass all claims within its scope. In our view, therefore, the questions whether the district court had subject matter jurisdiction and whether the complaint stated a claim are indistinguishable; both turn on the scope of the Act.

Richardson are not issues calling for this Court's attention.

a. In *Sisson* v. *Ruby*, *supra*, we argued that the Limitation of Liability Act should not be construed to permit shipowners to limit their liability for non-maritime claims—*i.e.*, claims that would otherwise be outside admiralty jurisdiction.[14] That is so because the Act is best understood as a statutory addition to the general system of admiralty and maritime law that incorporates the pre-existing limits of that system, rather than as a free-standing provision of independent scope. See *The "Scotland"*, 105 U.S. 24, 29-30 (1882) (the Limitation of Liability Act "declares the rule which the law-making power of this country regards as most just to be applied in maritime cases"); *Providence & New York S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 593-594 (1883) (the principle of limited liability is "nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time immemorial" and "the subject-matter itself is one that belongs to the department of maritime law"); *Norwich Co.* v. *Wright*, 80 U.S. (13 Wall.) 104, 116-120 (1872) (tracing maritime and admiralty origins of the Act).

When this Court first addressed the relationship between the Limitation of Liability Act and the admiralty jurisdiction, it held that the Act did not extend admiralty jurisdiction beyond its established territorial limits. *Ex parte Phenix Ins. Co.*, 118 U.S. 610 (1886). In that case, the owner of a steamer sought to limit its liability for claims arising from a fire caused by sparks from the steamer's smokestack. Because the fire occurred on land, claims for resulting damages fell outside admiralty jurisdiction as then defined. 118 U.S. at 618-619. See *The Plymouth*, 70 U.S. (3 Wall.) 20, 35 (1886). This Court held that the district court lacked jurisdiction over the petition to limit liability.

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[14] We have served the parties with copies of our brief in *Sisson* v. *Ruby*, *supra*. In this brief, we summarize the arguments we made in *Sisson*.

A few years later, in *Butler* v. *Boston & Savannah S.S. Co.*, 130 U.S. 527, 557 (1889), the Court reiterated that the Limitation of Liability Act applies only to waters within the scope of admiralty jurisdiction:

> It being clear, then, that the law of limited liability of shipowners is a part of our maritime code, the extent of its territorial operation * * * cannot be doubtful. It is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends—on the sea and the great inland lakes, and the navigable waters connecting therewith.

Accord *In re Garnett*, 141 U.S. 1, 12-18 (1891).

b. This Court's decision in *Richardson* v. *Harmon*, *supra*, departed from this settled understanding of the relationship between the Limitation of Liability Act and admiralty jurisdiction. In *Richardson*, the owners of a barge sought to limit their liability for damages arising from a collision between the barge and a bridge. The Court acknowledged that the collision was a non-maritime tort and "as such not within the cognizance of an admiralty court." 222 U.S. at 101. The Court also recognized that the resulting liability would not have been subject to limitation under the Limitation of Liability Act as originally enacted; the 1851 statute, the Court explained, "embraced liability for maritime torts, but excluded both debts and liabilities for non-maritime torts." 222 U.S. at 103. The Court concluded, however, that an amendment to the Limitation of Liability Act, Act of June 26, 1884, ch. 121, § 18, 23 Stat. 57-58, "was intended to add to the enumerated claims of the old law 'any and all debts and liabilities' not theretofore included," including non-maritime tort claims. 222 U.S. at 105. Accordingly, it held that the district court had jurisdiction to limit liability arising out of the collision.

For the reasons set forth in our brief in *Sisson* v. *Ruby*, *supra*, at 18-21, it remains our view that the lan-

guage and legislative history of the 1884 amendment do not support *Richardson*'s ruling that the legislation was intended to broaden the Limitation of Liability Act to non-maritime claims.[15] Moreover, the 1886 amendment to the Act on which petitioner relies (Pet. 14, 16)—which extends the statute to "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters," 46 U.S.C. App. 188—cannot fairly be construed to reach waters otherwise beyond the scope of admiralty jurisdiction. In fact, in *In re Garnett*, 141 U.S. at 12, this Court upheld the constitutionality of the 1886 Act on that understanding:

> It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the [1886 amendment]. The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in mari-

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[15] The 1851 Act limited a vessel owner's liability for, *inter alia*, "any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner" (46 U.S.C. App. 183(a)), whereas the 1884 amendment limited the shipowner's liability "to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole" (46 U.S.C. App. 189). Nothing in these two formulations suggests that the earlier enactment, but not the latter, should incorporate limitations on general admiralty jurisdiction. The legislative history likewise suggests no intention to abandon the well-established relationship between the Act and admiralty jurisdiction. When the provision was reported to the floor of the Senate, it was described, in modest terms, as "not so great a change as appears on the face of the law." 15 Cong. Rec. 976 (1884) (remarks of Sen. Frye). Later, in a very brief exchange, one Senator suggested that its only purpose was to protect shipowners from contractual liabilities. 15 Cong. Rec. 3971 (1884) (remarks of Sen. Vest). There is no indication that Congress considered—or meant to depart from—the understanding reflected in *Ex parte Phenix*, *Butler*, and other decisions.

> time matters, it extends to all matters and places to which the maritime law extends.[16]

In our view, therefore, the Limitation of Liability Act should be limited to claims that are otherwise within admiralty jurisdiction.

c. The authorities reflect some confusion regarding the scope of the Limitation of Liability Act. On the one hand, *Richardson* is often cited for the general proposition that "[p]roceedings by vessel owners to limit their liability * * * are within the admiralty jurisdiction even if the claims limited against might not be sued upon in admiralty." 1. S. Friedell, *Benedict on Admiralty* § 225 (rev. 7th ed. 1991).[17] On the other hand, a number of courts, including the court of appeals in the instant case, have held that the Limitation of Liability Act does not

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[16] *In re Garnett* answers petitioner's contention (Pet. 16) that the 1886 amendment was passed pursuant to the Commerce Clause and thus should be construed to extend to waters not subject to admiralty jurisdiction. First, this Court made clear in *In re Garnett, supra*, that the 1886 amendment is best understood as an exercise of Congress' power under the Article III grant of admiralty jurisdiction, rather than under the Commerce Clause. Second, in 1886, as the quotation in the text reflects, the Commerce Clause was regarded as narrower than the admiralty jurisdiction conferred by Article III. In 1886, Congress would have been unlikely to view the Commerce Clause as a source of authority that would enable it to extend the Limitation of Liability Act beyond the limits of admiralty jurisdiction. In any event, there is no indication that Congress intended such a step.

[17] See, *e.g.*, *Just* v. *Chambers*, 312 U.S. 383, 386 (1941) (Limitation of Liability Act "extends to tort claims even when the tort is non-maritime"); *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 44-45 (1934); *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U.S. 207, 217 (1927) (court of admiralty acquires the right to marshal "all claims, whether of strictly admiralty origin or not"); *The No. 6*, 241 F. 69 (2d Cir. 1917); *The Rochester*, 230 F. 519, 521 (W.D.N.Y. 1916); *The Irving F. Ross*, 8 F.2d 313 (D. Mass. 1923); *In re Highland Nav. Corp.*, 24 F.2d 582, 585 (S.D.N.Y. 1927); *The Atlas No. 7*, 42 F.2d 480 (S.D.N.Y. 1930); *In re Colonial Trust Co.*, 124 F. Supp. 73, 75 (D. Conn. 1954); *The Trim Too*, 39 F. Supp. 271, 273 (D. Mass. 1941).

apply to claims that are otherwise outside admiralty jurisdiction. *David Wright Charter Service, Inc.* v. *Wright*, 925 F.2d 783, 785 (4th Cir. 1991) (per curiam); *Lewis Charters, Inc.* v. *Huckins Yacht Corp.*, 871 F.2d 1046, 1052-1054 (11th Cir. 1989); *In re Sisson*, 867 F.2d 341, 348-350 (7th Cir. 1989), rev'd on other grounds, 110 S. Ct. 2892 (1990). *Richardson*, these courts have suggested, may be limited to its facts—*i.e.*, to shoreside damage caused by vessels on waters within the scope of admiralty jurisdiction.[18] Although we agree with the result reached in these cases, we believe that their reasoning is difficult to reconcile with *Richardson*'s broad holding that, as amended in 1884, the Limitation of Liability Act covers " 'any and all debts and liabilities' [of vessel owners] not theretofore included." 222 U.S. at 105.

In *Sisson* v. *Ruby*, *supra*, we were invited to file a brief at the petition stage, and we suggested that the Court should grant further review and to consider overruling *Richardson*. In its order granting certiorari in *Sisson*, this Court requested the parties "to brief and argue the question whether or not the Court should reconsider" *Richardson*. 110 S. Ct. 863 (1990). Ultimately, however, the Court found it unnecessary to resolve that question. 110 S. Ct. at 2894 n.1.

Although the scope of the Limitation of Liability Act and the continuing validity of *Richardson* are matters that may someday call for the Court's attention, we believe that this Court need not address those issues in this case. To our knowledge, no decision suggests that the Limitation of Liability Act should be applied to inland lakes that are incapable of supporting interstate commercial navigation.[19] *Richardson* did not purport to address

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[18] Because of the enactment of the Extension of Admiralty Act, 46 U.S.C. App. 740, the precise claims at issue in *Richardson* are now within the admiralty jurisdiction of the federal courts. Thus, *Richardson*'s construction of the statute is unnecessary to enable shipowners to limit liability for such claims.

[19] See *Marroni* v. *Matey*, 492 F. Supp. 340 (E.D. Pa. 1980); *In re Stephens*, 341 F. Supp. 1404 (N.D. Ga. 1965); *Doran* v. *Lee*, 287

those waters, and thus does not bind lower courts to apply the statute in that context. Consequently, notwithstanding the uncertainty regarding *Richardson*, we do not believe that this case warrants further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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F. Supp. 807, 809-810 (W.D. Pa. 1968); *In re Builders Supply Co.*, 278 F. Supp. 254, 256-257 (N.D. Iowa 1968); *Johnson* v. *Wurthman*, 227 F. Supp. 135 (D. Ore. 1964); *In re Howser's Petition*, 227 F. Supp. 81 (W.D.N.C. 1964); *In re Madsen's Petition*, 187 F. Supp. 411 (N.D.N.Y. 1960).

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In the Supreme Court of the United States

OCTOBER TERM, 1990

THREE BUOYS HOUSEBOAT
VACATIONS U.S.A., LTD.
Petitioner,

vs.

HARVEY G. MORTS, et al.,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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NO. 90-1487

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

Petitioner, Three Buoys Houseboat Vacations U.S.A., Ltd., submits this Supplemental Brief, pursuant to Supreme Court Rule 16.7, to call the Court's attention to an April 1, 1991 decision of the United State Court of Appeals for the Fourth Circuit pertinent to the issues submitted in Three Buoys' Petition for a Writ of Certiorari. The concerned case is *Price v. Price*, ____ F.2d ____, C.A. No. 90-1480 (4th Cir. 1991), attached at Supplemental Appendix A-1.

In Reason I, Section C, of Three Buoys' Petition for a Writ of Certiorari, Three Buoys questions the Eighth Cir-

cuit's disregard of "potential navigability" as a valid test to find a waterway navigable and within the admiralty and maritime jurisdiction. The Fifth and Sixth Circuits, as well as district courts in the Second and Fourth Circuits, recognize the sufficiency of "potential navigability." Now, the United States Court of Appeals for the Fourth Circuit has joined in rejecting "contemporary navigability in fact" as a legitimate test for jurisdictional purposes.

In *Price,* Mrs. Price sued Mr. Price for personal injuries allegedly sustained because Mr. Price improperly beached a small pleasure boat being operated on John H. Kerr Reservoir in Virginia. Mrs. Price claimed that Mr. Price failed to beach broadside to the land and/or failed to minimize the wake causing the boat to rock as she tried to step out of the boat to shore. The court described the location of the accident in terms remarkably similar to the Lake of the Ozarks.

> "The Kerr Reservoir is one of a series of man-made lakes constructed in the Roanoke River Basin by the Army Corps of Engineers and by certain private utilities. It is regulated by the Army Corps of Engineers and patrolled by the Coast Guard."

(at Slip Opinion p.7, Supp. A-5).

The district court improperly dismissed the claim for lack of jurisdiction using a test which mirrored the Eighth Circuit's test in *Three Buoys Houseboat Vacations U.S.A. Inc., Ltd. v. Morts,* 921 F.2d 775 (8th Cir. 1990) (A-1). The district court focused exclusively on whether the reservoir was *currently* being used for commercial navigation.

In reversing the district court, the Fourth Circuit recognized that present commercial navigation would clearly place a waterway within the admiralty jurisdiction.

However, the court went on to say that "**[e]ven in the ordinary meaning of the word, navigable is significantly broader and encompasses a notion that a body of water is capable of being navigated.**" (at Slip Opinion p. 7, Supp. A-7). The Fourth Circuit relied upon *The Daniel Ball*, 77 U.S. (10 Wall) 557 (1870) to support the disjunctive test for maritime navigable waters: "The waters are navigable if they are currently being used as a highway of commerce *or* if they are susceptible of being so used." (at Slip Opinion p. 5, Supp. A-4).

The Fourth Circuit correctly enunciated the law that "potential navigability" is the proper test for admiralty jurisdiction. The Eighth Circuit's decision in three Buoys is incorrect and in direct conflict, now, with the Fourth Circuit. The Eighth Circuit specifically rejected "potential navigability" when it recognized that "*[n]either the possibility of future navigation* in the event the Army Corps of Engineers removes the dam *nor the prior alleged navigability* of the Osage River before the existence of the dam *alters the present facts.*" (emphasis added) (A-7) As such, the Eighth Circuit is more isolated than ever and should be corrected before more substantial damage is done to the uniformity so necessary to the strength of the admiralty and maritime law of the United States.

The Fourth Circuit recognized the importance and need for uniformity and predictability in maritime related activities.

> " Rules governing conduct on navigable waters cannot remain uniform or have any certainty if their applicability is dependent on whether, on any given day, commerical maritime activity is being conducted on the waters. **The resolution of every routine dispute would be burdened by the impracticable requirement of surveying the body**

> **of water before the threshold issue of jurisdiction would be determined.** Thus the test for navigability is based on a broader and more stable factor than whether the body of water is currently being used for commercial navigation. It must also include a consideration of whether the body of water is *capable* of bearing commercial navigation." (italics in original, bolding added).

(at Slip Opinion p. 4, Supp. A-4)

CONCLUSION

In order to provide uniformity amongst the circuits and uniformity under the admiralty and maritime law, this Court should accept certiorari in this matter and reverse the Eighth Circuit's rejection of admiralty jurisdiction over this litigation.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 90-1480

STELLA S. PRICE,
Plaintiff-Appellant,

versus

MARSHALL E. PRICE, SR.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Lynchburg. Jackson L. Kiser, District Judge. (CA-89-58-L)

Argued: December 3, 1990 Decided: April 1, 1991

Before PHILLIPS and NIEMEYER, Circuit Judges, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Phillips and Senior Judge Merhige joined.

ARGUED: Thomas L. Phillips, Jr., PHILLIPS, PHILLIPS & PHILLIPS, Rustburg, Virginia, for Appellant. Eleanor A. Putnam Dunn, EDMUNDS & WILLIAMS, P.C., Lynchburg, Virginia, for Appellee. **ON BRIEF:** Thomas L. Philips, PHILLIPS, PHILLIPS & PHILLIPS, Rustburg, Virginia, for Appellant. Bevin R. Alexander, Jr., R. Edwin Burnette, Jr., EDMUNDS & WILLIAMS, P.C., Lynchburg, Virginia, for Appellee.

NIEMEYER, Circuit Judge:

We must decide in this case whether a negligence claim based on personal injury, sustained when a passenger disembarked from a small pleasure boat on the John H. Kerr Reservoir in Virginia, is within the admiralty jurisdiction of the federal courts under 28 U.S.C. § 1333.

On the afternoon of August 15, 1987, Stella S. Price was one of several passengers on a motorboat being operated by her husband, Marshall E. Price, Jr., on the John H. Kerr Reservoir (also known as Buggs Island Lake). As it began to rain, Mr. Price attempted to beach his boat at a nearby shore to disembark the passengers. As Mrs. Price attempted to disembark, a wave which had been created by the boat's wake caused her to lose balance and injure herself. In her complaint she alleges that Mr. Price exceeded a reasonable speed, that he failed to take the wake into account, that he failed to secure the boat adequately for disembarking passengers, and that he should have brought the boat in to allow the passengers to disembark over the side rather than the bow. Mr. Price filed a motion to dismiss the complaint for lack of jurisdiction, which the district court granted.

Admiralty jurisdiction over maritime torts depends on the *locus* of the tort on navigable waters and its *nexus*

with traditional maritime activity. Although the determining test had for years been based strictly on the locus, beginning with the Supreme Court's decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), both criteria of *locus* and *nexus* must be satisfied. *See also Sisson v. Ruby*, ___ U.S. ___, 110 S.Ct. 2892 (1990), and *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982).

In dismissing this case for lack of admiralty jurisdiction, the district court held that the Kerr Reservoir was not navigable because it is not "currently used for maritime purposes." J.A. 12. It also found that the tort did not bear a significant relationship to traditional maritime activity because "the plaintiff's case is one for simple negligence, therefore, traditional concepts of admiralty need not be invoked to resolve the case." J.A. 14. Because the district court failed to apply the appropriate standard on both points, we reverse.

I.

In arguing that the Kerr Reservoir is not a navigable body of water, Mr. Price contends that admiralty jurisdiction should be limited "to those bodies of water where genuine commercial activity occurs."He argues that because "no maritime commerce takes place on its waters now nor is reasonably likely to take place in the future," the district court did not have admiralty jurisdiction, citing *Motley v. Hale*, 567 F. Supp. 39 (W.D. Va. 1983), which held that a similar nearby lake (Smith Mountain Lake) was not a navigable waterway. Brief of Appellee at 8-9. The test advocated by Mr. Price is too narrow.

The law of admiralty developed to accommodate problems of commercial shipping on the high seas and navigable waters to provide uniform rules of conduct.

Because of the potential adverse effect on the law of admiralty that might be caused by a different set of rules for pleasure craft, and indeed the direct disruptive impact on maritime activity itself by having noncommercial craft operate under rules different from those governing commercial craft, all activities on navigable waters that might have a significant relationship to traditional maritime activity are subject to the jurisdiction of the admiralty courts. *See Sisson*, 110 S.Ct. at 2895-96; *Foremost*, 457 U.S. at 674-75. Rules governing conduct on navigable waters cannot remain uniform or have any certainty if their applicability is dependent on whether, on any given day, commercial maritime activity is being conducted on the waters. The resolution of every routine dispute would be burdened by the impracticable requirement of surveying the body of water before the threshold issue of jurisdiction could be determined. Thus, the test for navigability is based on a broader and more stable factor than whether the body of water is currently being used for commercial navigation. It must also include a consideration of whether the body of water is *capable* of bearing commercial navigation.

We return to the Supreme Court's definition of navigable waters given in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), where the Court said that waters are navigable

> when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The definition has two disjunctive aspects. The waters are navigable if they are currently being used as a highway of commerce *or* if they are susceptible of being so used. Waters are susceptible of such use when they are, in their

current configuration, capable of commercial navigation.

We recognize that the Court in *The Daniel Ball* was describing navigable waters of the United States as used in a regulation supported by the commerce clause, and we must be wary that the definition of navigability may vary depending on the purpose for which it is being used. *See Kaiser Aetna v. United States*, 444 U.S. 164, 170-71 (1979). With that in mind, we nevertheless conclude that the definition of navigable waters given in *The Daniel Ball* is applicable in answering the question of whether waters are navigable for purposes of admiralty jurisdiction. Virtually every circuit that has invoked a definition of navigable waters in the context of determining admiralty jurisdiction has likewise resorted to the definition in *The Daniel Ball*. *See Finneseth v. Carter*, 712 F.2d 1041, 1043-44 (6th Cir. 1983); *Livingston v. United States*, 627 F.2d 165, 170 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); *Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975); *cf. Chapman v. United States*, 575 F.2d 147, 151 (7th Cir. 1978) (*en banc* (no admiralty jurisdiction over a recreational boat accident which occurs on waters that are not used for commercial navigation and are not susceptible of such use in their present state), *cert. denied*, 439 U.S. 893 (1978).

The Kerr Reservoir is one of a series of man-made lakes constructed in the Roanoke River Basin by the Army Corps of Engineers and by certain private utilities. It is regulated by the Army Corps of Engineers and patrolled by the Coast Guard. The Kerr Reservoir is the largest of the lakes in the series, having a shoreline of approximately 800 miles and a water surface area of over 48,000 acres. It straddles the state line between Virginia and North Carolina and is used almost entirely for pleasure boating. The parties have pointed to one professional fishing guide who makes his living chartering boats and services on the lake. All other commercial activity supports the recrea-

tional use. The only municipality on the reservoir, Clarksville, Virginia, informed the parties that its two large manufacturing concerns, Burlington Industries (a textile manufacturer) and Russell Stover (a candy maker), ship their products exclusively over land. No one in this case, however, disputes the fact that the Kerr Reservoir is capable of supporting commercial shipping.

Other lakes created by the Army Corps of Engineers in the Roanoke River Basin system include, among others, Philpott Lake and Lake Gaston. In *Souther v. Thompson*, 754 F.2d 151, 152 (4th Cir. 1985), we stated that Philpott Lake is a navigable waterway for purposes of admiralty jurisdiction. In *Richards v. Blake Builders Supply Inc.*, 528 F.2d 745, 746-47 (4th Cir. 1975), we stated that both of the occurrences at issue there were on navigable waters, i.e. Lake Gaston and Cape Fear River, even though there was no evidence of any substantial commercial activity.

In finding that the Kerr Reservoir was not navigable, the district court directed its focus solely on whether the Kerr Reservoir was "currently being used" for commercial navigation. Concluding that evidence of one fisherman who charters his boat for recreational fishing is insufficient to "transform the lake into a navigable body of water," the court said,

> As such, I find that the lake is not currently used for maritime purposes. Accordingly, I find that Buggs Island Lake is not a navigable body of water for admiralty jurisdiction purposes.

J.A. 12.

Evidence that a body of water is currently being used

for commercial navigation may support the conclusion that it *is* navigable. However, merely because a body of water is not currently being used for commercial navigation does not require the opposite conclusion, that it is not navigable. Even in the ordinary meaning of the word, navigable is significantly broader and encompasses the notion that a body of water is capable of being navigated.

> [T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. . . . The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.

The Montello, 87 U.S. (20 Wall) 430, 441 (1874).

Although the Kerr Reservoir may not currently be used for commercial navigation, because it is capable of being used for purposes of transportation and commerce by customary modes of trade and travel on water, it is a navigable waterway for purposes of determining admiralty jurisdiction.

II

The additional prerequisite for exercising admiralty jurisdiction over a tort which occurs on navigable waters is that the tort bear a "significant relationship to traditional maritime activity." *Foremost*, 457 U.S. at 669; *Executive Jet*, 409 U.S. at 268. In answering the inquiry of whether a tort bears the necessary nexus, we have directed that all circumstances of the tort be examined. To organize that inquiry we have identified four factors. *See Bubla v. Brad-*

shaw, 795 F.2d 349, 351 (4th Cir. 1986) (the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and type of injury, and traditional concepts of the role of admiralty); *see also Oman v. Johns-Manville Corp.*, 764 F.2d 224, 230 and n.3 (4th Cir.), *cert. denied*, 474 U.S. 970 (1985).

In *Sisson*, however, the Supreme Court redirected the inquiry from an examination of the particular circumstances of the tort in question to a more generalized analysis to determine whether principles applicable to resolving the tort issues will impact traditional maritime activity. Keeping the focus on the potentially disruptive impact on maritime commerce, the Court directed that the "jurisdictional inquiry does not turn on the *actual* effects" nor on "the particular facts of the incident" involved. 110 S.Ct. at 2896 (emphasis in original). "Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." *Id.*

An examination of the factors which we identified in *Bubla* and *Oman* is still an acceptable systematic method for making the analysis. However, we must project more generally the composite genre of the tort or its essential elements and determine whether traditional maritime commerce will be affected. Thus, the crash into navigable waters of an airplane which was crippled on takeoff over land or the injury sustained by a swimmer in navigable waters from a collision with another swimmer may give rise to tort claims, but not claims that bear a substantial relationship to traditional maritime activity. *Executive Jet*, 409 U.S. at 255, 268. On the other hand, an accident between two pleasure craft resulting from errors in navigation is held to involve principles of traditional maritime rules, even though no commercial entity was a participant

in the particular incident. *Foremost*, 457 U.S. at 675 & n.5. It is maintained there that rules fashioned for pleasure craft would likely have an impact on the intercourse of pleasure craft with commercial shipping. *Id.* at 676.

In broadening the nexus test to include torts involving solely pleasure craft, the rule of *Foremost* has provoked a legitimate inquiry into the proper balance between admiralty jurisdiction and traditional civil jurisdiction over torts. *See* Smith, *Choice of Law Analysis: the Solution to the Admiralty Jurisdictional Dilemma*, 14 Tul. Mar. L. J. 1, 26-35 (1989); Carnilla and Drzal, *Foremost Insurance Co. v. Richardson: If this is Water, It Must be Admiralty*, 59 Wash. L. Rev. 1 (1983). A similar concern understandably prompted the district court to reach the decision it did in this case. Nevertheless, we are bound to apply the principles of *Foremost* and *Sisson* to this case.

In this case the district court concluded that the substantial relationship with maritime activity did not exist because

> [t]he plaintiff's case is one for simple negligence, therefore, traditional concepts of admiralty need not be invoked to resolve this case.
>
> Accordingly, I find that the plaintiff has failed to show a sufficient nexus between her injury and traditional maritime activity.

J.A. 14. The district court's analysis, however, must be taken one step further, by asking whether the core activity giving rise to Mr. Price's alleged negligent conduct was related to an activity which is traditionally maritime. The complaint of Mrs. Price specifically charged Mr. Price with errors in navigation. She complained that with his excessive speed he generated a wake that caused her injury.

She also complained that he failed to approach the shore correctly for the purpose of beaching his boat and disembarking his passengers. By applying the *Sisson* approach and examining the general character of the allegations, we conclude that the overriding factor in this case, which brings it within the courts of admiralty, is the source of liability emanating from the navigation of a vessel, albeit a small pleasure boat. *See Foremost*, 457 U.S. at 675 n.5 (noting "traditional concern that admiralty law holds for navigation"); *Hogan v. Overman*, 767 F.2d 1093, 1094 (4th Cir. 1985) (the most fundamental of traditional maritime activities is navigation of a vessel); *Oliver by Oliver v. Hardesty*, 745 F.2d 317, 319-20 (4th Cir. 1984) (noting that *Foremost* placed significant emphasis on the importance of governing the navigation of all vessels).

Because the tort described in the complaint occurred on navigable waters and bore a substantial relationship to traditional maritime activity, admiralty jurisdiction was properly invoked by the plaintiff. The order of the district court dismissing the case for lack of subject matter jurisdiction is reversed, and this case is remanded for further proceedings.

REVERSED AND REMANDED

MOTION FILED
APR 22 1991

No. 90-1487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD.,
Petitioner,

—vs.—

HARVEY G. MORTS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1487

In the Matter of:

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD.,

Petitioner,

—VS.—

HARVEY G. MORTS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the petition for a writ of certiorari filed by Three Buoys Houseboat Vacations U.S.A., Ltd. Petitioner has given consent, but Respondents have not, and leave to file must be sought pursuant to Rule 37.4.

NATURE OF APPLICANT'S INTEREST

MLA has a very strong interest in the disposition of this case. It is a nationwide bar association founded in 1899, having a membership of about 3700 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, boatowners, charterers, cargo owners, shippers, forwarders, terminal operators, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and others.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for its discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the ninety years of existence, has sponsored a wide range of legislation dealing with maritime matters and has also cooperated with Congressional committees in the formulation of other maritime legislation.[1]

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1 E.g., Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-1175; 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing

MLA believes uniformity in maritime law is of great importance. This concern has been repeatedly expressed by its membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of Maritime Law recommended that steps be taken to persuade Congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted on April 25, 1975.[2] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[3]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including five accepted by the United States Supreme Court.[4]

It is the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted* in 6 Benedict on Admiralty, Doc. No. 3-4 at 3-34.1-78.2 (7th ed. 1988), see C.F.R. ch. 1, subch, D, Special Note at 160 (1987); Federal Court Jurisdiction Bill, S. 1876, 93d Cong., 1st Sess. (1973); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073; Shipowner's Limitation of Liability Bill, H.R. 277, 99th Cong., 1st and 2nd Sess. (1985, 1986).

2 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

3 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

4 *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed. 2d 127 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Sisson v. Ruby*, 497 U.S. _____, 110 S.Ct. 2892 (1990). For a more complete listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

Such a situation exists in this case. The Eighth Circuit Court of Appeals has limited admiralty and maritime jurisdiction too narrowly, without regard to material considerations which other circuit courts and this court have thought relevant. Moreover, in failing to follow *Richardson v. Harmon*, 222 U.S. 96 (1911), it would also have the effect of denying a vessel owner his right to seek limitation of liability, which can properly be sought only in a federal district court. Both aspects of the *Three Buoys* decision would adversely affect uniform interpretation and application of the admiralty and maritime law.

MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES.

MLA's perspective, arising from its interest in the uniformity and predictability of U.S. maritime law, necessarily is different from those of the parties to this particular suit, who are most interested in its outcome as it affects their individual positions. MLA can therefore most effectively treat the need for a decision by this Court which would foster national uniformity and clarity on the issues presented.

Date: April 22, 1991

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether admiralty jurisdiction exists by reason of a collision between a commercial service vessel and a houseboat on the Lake of the Ozarks.

2. Whether, if such admiralty jurisdiction does not exist, the district court nevertheless has jurisdiction to adjudicate the vessel owner's rights by virtue of the Limitation of Liability Act, 46 U.S.C. App. §§ 181 *et seq.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by Three Buoys Houseboat Vacations U.S.A., Ltd.

STATEMENT

The Osage River in the State of Missouri is a tributary of the Missouri River and for the material part of its length has long been recognized as part of the navigable waters of the United States. The U.S. Army Corps of Engineers (Army Corps) authorized a private utility company to build

and operate a lockless hydroelectric dam (Bagnell Dam) pursuant to a license issued by the Federal Energy Regulatory Commission (FERC). Bagnell Dam is located some 82 miles upstream from where the Osage joins the Missouri. The impoundment of the Osage River's waters by the dam created the Lake of the Ozarks, a very large body of water whose main channel is navigable for some 89 miles upriver from the dam. Thus the total navigable length, both above and below the dam, is about 171 miles (82 plus 89).

The FERC license specifically declares the Osage River to be a navigable waterway of the United States affecting the interests of interstate or foreign commerce, and specifically reserves to the United States the rights to require removal of the dam, to construct necessary facilities for navigation, to use all water necessary for navigation, and to terminate the license.

The Lake of the Ozarks is capable of sustaining commercial shipping, which takes place in the form of carriage of passengers and goods for hire.

The Army Corps has retained authority concerning permitting any obstruction to navigation in the lake.

The United States Coast Guard inspects passenger excursion vessels and has exclusive responsibility for enforcement of Federal inspection and other statutes applicable to non-recreational vessels. Under an agreement between the Coast Guard and the State of Missouri, there is a sharing of responsibilities concerning navigation in the lake, with the Coast Guard delegating certain functions to the State.

It appears that the applicable navigational Rules of the Road on the lake are the United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2038, 2071-2073.

Three Buoys Houseboat Vacations U.S.A., Ltd. (Three Buoys) owned a commercial service vessel. On August 2, 1987, while returning from a commercial service job on the Lake of the Ozarks, the vessel collided with a houseboat. The respective parties herein have alleged that the collision was

caused by negligence on the part of the houseboat or the service vessel entailing violations of the Rules of the Road governing navigation.

Three Buoys filed a complaint for exoneration from or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. App. § 181 *et seq.* Claimants answered and filed motions to dismiss the complaint for lack of subject matter jurisdiction.

The district court granted those motions on June 27, 1988. It held there was no admiralty jurisdiction because the Bagnell Dam prevents passage of boats from the lower Osage River into the lake and therefore the lake is presently incapable of sustaining commercial shipping, i.e., interstate navigation. (A-33)[1] It held there was federal question jurisdiction, pursuant to 28 U.S.C. §§ 1331 and 1337, over this limitation of liability proceeding which arises under an Act of Congress regulating commerce (A-35). However, it concluded that the Limitation of Liability Act only applied to events giving rise to claims occurring on waters which are "navigable" for purposes of admiralty jurisdiction and therefore dismissed the limitation complaint for failure to state a claim under the Limitation of Liability Act. (A-37, 38)

On appeal the Eighth Circuit affirmed the dismissal. Referring to *Livingston v. United States,* 627 F.2d 165 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981), which in turn had interpreted this Court's observations on "navigability" in relation to the purpose for which it is defined in *Kaiser Aetna v. United States,* 444 U.S. 164, 171-172 (1979), the Eighth Circuit held there was no federal admiralty jurisdiction because such jurisdiction required contemporary navigability in fact by interstate or foreign commercial shipping (A-14, 15). Contrary to the district court, it opined there was no federal question jurisdiction because it found no precedent for such jurisdiction under 28 U.S.C. §§ 1331 and 1337 in connection with the Limitation of Liability Act (A-16); it

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1 References (A-) are to Petitioner's Appendix

asserted that the cause of action arose under state rather than federal law and the Limitation of Liability Act has never extended federal court jurisdiction (A-17, 18). Finally, it concluded that "because the reach of the Limitation of Liability Act is coextensive with admiralty," limitation would not apply in any event because the lake is not navigable in fact for purposes of admiralty jurisdiction (A-19-22).

On the latter points the Eighth Circuit relied in considerable part on the decision in *In the Matter of Sisson*, 867 F.2d 341 (7th Cir.1989), *rev'd on other grounds sub. nom. Sisson v. Ruby*, 497 U.S. ____, 110 S. Ct. 2892 (1990). It did not mention *Richardson v. Harmon*, 222 U.S. 96 (1911), which held that a vessel owner was entitled to seek limitation of liability with respect to a non-maritime tort, by virtue of 46 U.S.C. § 189 (Appendix hereto).

This Court vacated the Eighth Circuit's decision and remanded the case for consideration in light of this Court's opinion in *Sisson v. Ruby*, 497 U.S. ____, 110 S. Ct. 2892 (1990).

On remand the Eighth Circuit, emphasizing the lack of an "interstate" connection (A-7), found nothing in *Sisson* which persuaded it to alter its judgment.[2] It went on to reiterate the views expressed in its first opinion and reaffirm dismissal of the limitation complaint, overruling its earlier decision holding the same lake navigable, *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306 (8th Cir. 1957).

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2 It is of interest to note that one leading text, in discussing the *Three Buoys* remand, thought it unlikely that this Court would "jettison the locality requirement in silence" and has suggested a "more likely explanation" of the *Three Buoys* remand is that this Court "wanted the Court of Appeals in *Three Buoys* to consider the question not addressed in *Sisson*, that is, whether the Limitation of Liability Act applies to claims that are outside the admiralty jurisdiction provided by 28 U.S.C. § 1333." 1 S. Friedell, *Benedict on Admiralty* (7th ed. 1988), § 171, n. 69 (1991 Supp.).

SUMMARY OF ARGUMENT

A. By narrowly focusing solely on a rigid requirement of present navigability in interstate commerce as being a *sine qua non* for admiralty jurisdiction the Eighth Circuit in *Three Buoys* has unjustifiably limited admiralty jurisdiction. We submit it has done so as a result of misapplying or disregarding prior decisions and has taken a position diverging significantly from that of other circuits. We find no decision of this Court barring admiralty jurisdiction over state waters. In any event, this case involves a collision of a commercial vessel on a large lake formed by damming a navigable river, with the Federal Government expressly retaining extensive authority and jurisdiction. The waters of the lake are used for commerce and, in the circumstances here present, this collision falls within admiralty jurisdiction.

B. Even if there were no admiralty jurisdiction, the Limitation of Liability Act, enacted to encourage both shipping and shipbuilding, is applicable to non-maritime torts. In the circumstances of this collision and the limitation proceedings, the district court has jurisdiction in consequence of Congressional legislative power and such authorities as *Richardson v. Harmon*, 222 U.S. 96 (1911).

ARGUMENT

A. In this case of a collision involving a commercial vessel, the Lake of the Ozarks, formed from the navigable Osage River by a dam built pursuant to federal government authorization with significant reservations of federal power concerning navigation, should be considered a navigable waterway to which admiralty jurisdiction applies, even though the dam bars navigation continually afloat directly from the lake to other states.

This Court, in a variety of cases, has had occasion to define or characterize navigable waters. The grant of admiralty jurisdiction to the district courts was once thought to be

confined to tide waters but, in *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443 (1852), that requirement was abandoned. The case concerned a collision on one of the (non-tidal) Great Lakes to which admiralty and maritime jurisdiction had been extended by act of Congress. The act was held constitutional, the Court stating that jurisdiction depends on "the navigable character of the water, and not the ebb and flow of the tide." *Id.* at 457.

Jackson v. Steamboat Magnolia, 20 How. 296 (1857) held there was admiralty jurisdiction in the case of a collision far inland above tide water on a river connected to the sea, the court commenting:

> The admiralty jurisdiction surrendered by the States to the Union had no such bounds as exercised by themselves, and is clogged with no such conditions in its surrender.

Id. at 301.

The Daniel Ball, 10 Wall. 557 (1870), arose from a libel in admiralty of a steamer operating on Grand River within Michigan for violation of federal license and inspection laws enacted pursuant to the Commerce Clause. In holding Grand River to be navigable water of the United States the Court said:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And *they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition*, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the custom-

> ary modes in which such commerce is conducted by water.

Id. at 563, emphasis added.

In a case involving a similar libel, *The Montello*, 20 Wall. 430 (1874), the Court held the Fox River in Wisconsin navigable, although in its natural state its commerce had been interrupted by portages and obstructions. The Court said:

> The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. *If it be capable in its natural state of being used for purposes of commerce*, no matter in what mode the commerce may be conducted, *it is navigable in fact*, and becomes in law a public river or highway . . .

Id. at 441-2, emphasis added.

In *Economy Light Co. v. United States*, 256 U.S. 113 (1921), the United States sued to enjoin defendant from building a dam in the Desplaines River, Illinois, alleging the river to be a navigable waterway of the United States, although, partly due to artificial obstructions, it had not been used for 100 years. Quoting the above language from *The Montello*, the Court held it to be navigable and added:

> We concur in the opinon of the Circuit Court of Appeals that a river having actual navigable capacity in its natural state and capable of carrying commerce among the United States, is within the power of Congress to preserve for purposes of future transporation, *even though it be not at present used for such commerce, and be incapable of such use according to present methods*, either by reason of changed conditions or *because of artificial obstructions*. . . .

Id. at 123, emphasis added.

U.S. v. Appalachian Power Co., 311 U.S. 377 (1940), concerned the licensing of a dam. Holding that a waterway,

which can by reasonable improvement be made available for navigation, is a navigable waterway of the United States the Court said:

> In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole . . . The respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid authority of the Government over the stream. That authority is as broad as the needs of commerce . . .

Id. at 426.

Kaiser Aetna v. United States, 444 U.S. 164 (1979), concerned the navigational servitude and the question of compensation with respect to a "taking". In its opinion this Court pointed out the Government's position that Kaiser Aetna's improvment of Kuapa Pond made it part of the navigable water the United States, giving the public the right to use the pond without compensating Kaiser Aetna. *Id.* at 170. It was in this context that the Court observed:

> The position advanced by the Government, and adopted by the Court of Appeals below, presumes that the concept of "navigable waters of the United States" has a fixed meaning that remains unchanged in whatever context it is being applied. While we do not fully agree with the reasoning of the District Court, we do agree with its conclusion that all of this Court's cases dealing with the authority of Congress to regulate navigation and the so-called "navigational servitude" cannot simply be lumped into one basket . . . As the District Court aptly stated, "any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which

> the concept of 'navigability' was invoked in a particular case . . ."
>
> It is true that Kuapa Pond may fit within definitions of "navigability" articulated in past decisions of this Court. But it must be recognized that the concept of navigability in these decisions was used for purposes other than to delimit the boundaries of the navigational servitude: for example . . . [a number of examples given].

Id. at 170-71, footnotes omitted. Thus the Court made the foregoing observations in order to differentiate the concept of navigability applicable to the navigational servitude from other concerns. We submit that it does not follow that definitions of navigability developed in each area of the law necessarily apply only to that area. As we have seen, this Court has not so confined itself. *Economy Light*, *supra*.

However, the Eighth Circuit did, in *Livingston v. United States*, 627 F. 2d 165, 169-170 (8th Cir. 1980), *cert denied*, 450 U.S. 914 (1981), coming to the conclusion that "a functional analysis" of "navigability" is required. We submit this is too narrow and fact-specific to serve as a proper test for admiralty jurisdiction and is inconsistent with the approach heretofore followed. *Livingston* further concluded:

> . . . Extensions of admiralty jurisdiction have followed the opening of new waters to commercial shipping. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 453-54, 13 L.Ed. 1058 (1851). In our view, the closing of waters to *commercial shipping* should likewise have the effect of eliminating admiralty jurisdiction over them. In other words, the concept of "navigability" in admiralty is properly limited to describing a present capability of waters to sustain *commercial shipping*.

Id. at 169-170, footnote omitted, emphasis added.

The foregoing reads too much into the reasoning of *Genesee Chief* which was concerned with whether tide water was a requisite for admiralty jurisdiction in the context of constitutionality of an act of Congress. Moreover, it refers to closing the waters to commercial shipping and is thus not squarely applicable to *Three Buoys* inasmuch as the Lake of the Ozarks supports commercial traffic and in fact the collision herein involves a commercial service vessel. Moreover, *Livingston* supports its views by reference to *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975) and *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978) (*en banc*), *cert. denied*, 439 U.S. 893 (1978), both of which are grounded in lack of present or potential commercial shipping as barring admiralty jurisdiction, rather than cutting off interstate traffic which is *Three Buoys*' rationale. Thus, we submit, *Three Buoys*' true ground of decision on this point diverges from the grounds adopted by the other circuits.

On the subject of a necessity for interstate or foreign commerce for admiralty jurisdiction, the constitutional grant does not expressly require it, and we find no decision of this Court imposing it. Indeed, in *Ex parte Boyer*, 109 U.S. 629 (1884), which held an "interstate" canal within a state to be navigable water of the United States, the Court expressly reserved the point, saying:

> This case does not raise the question whether the admiralty jurisdiction of the district court extends to waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State or in a foreign country; and no opinion is intended to be intimated as to jurisdiction in such a case.

Id. at 632. *And see Jackson v. Steamboat Magnolia*, *supra*.

Considering the above authorities, the clear federal interest in the Lake of the Ozarks, and its commercial traffic (including one of the colliding vessels), we respectfully submit that the Eighth Circuit clearly erred in denying admiralty jurisdiction in this matter.

B. Even if this collision on the Lake of the Ozarks does not otherwise fall within admiralty jurisdiction, a complaint seeking vessel owner's limitation of liability with respect thereto is within the district court's jurisdiction by virtue of the Limitation of Liability Act, authority for which is grounded in both the admiralty legislative power derived from the admiralty jurisdictional grant and the Commerce Clause.

Even if there were no admiralty and maritime jurisdiction under more general principles, there is jurisdiction by virtue of the complaint being brought under the Limitation of Liability Act, 46 U.S.C. §§ 183 *et seq*. Under § 185, the limitation proceeding is to be brought in a district court of the United States. (A-40)

Long before that part of § 185 was enacted this Court, in *Norwich Company v. Wright*, 80 U.S. (13 Wall.) 104 (1871), pointed out that while the limitation act did not prescribe what court should be resorted to, no court was better adapted than a court of admiralty to administer such [limitation] relief, and went on to say:

> . . . . . It is evident that the State courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding.

Id. at 123-24. In thereafter describing the proper course for pleading a limitation action in the District Court so as to effectively bar other actions in state courts, the Court said:

> The Court having jurisdiction of the case, under and by virtue of the act of Congress, would have the right to

> enforce its jurisdiction and to ascertain and determine the rights of the parties. For aiding parties in this behalf, and facilitating proceedings in the District Courts, we have prepared some rules which will be announced at an early day.

Id. at 125. Those rules were duly issued as part of the admiralty rules and their current successor, Fed.R. Civ.P. Supplemental Admiralty Rule F, remains in effect. Since *Norwich* the courts have consistently held that limitation of liability proceedings are to be filed in the District Court.

As was said in *The Hamilton*, 207 U.S. 398 (1907):

> The power of Congress to legislate upon the subject [limitation of liability] has been derived both from the power to regulate commerce and from the clause in the Constitution extending the judicial power to "all cases of admiralty and maritime jurisdiction." Art. 3, § 2; 130 U.S. 557.

Id. at 403-4.

In *Three Buoys* the Eighth Circuit referred to *Butler v. Boston Steamship Co.*, 130 U.S. 527, 555, 557 (1889), in reaching the conclusion that "courts have consistently limited the application of the Limitation of Liability Act to waters encompassed within the territorial domain of admiralty and maritime law." (A-20-21) However, the *Butler* quotations employed by the *Three Buoys* court were made by the *Butler* court not to demonstrate a territorial limitation as to applicability of the Limitation of Liability Act, but to show that it extended into state waters and took precedence over a state law which would have imposed unlimited liability, even though the stranding of the vessel occurred within state waters. Immediately after the last passage quoted in *Three Buoys*, the *Butler* court stated:

> The present case, therefore, is clearly within the admiralty and maritime jurisdiction . . . Though within a few rods of the island (which is a county of Massachusetts) and within the jaws of the headland, it was on the

> navigable waters of the United States, and no state legislation can prevent the full operation of the maritime law on those waters. *Id.* at 557.

We submit that, even without admiralty jurisdiction, by virtue of Congressional power to legislate with respect to waterways under the Commerce Clause and with respect to vessel owners under both the Commerce Clause and the admiralty jurisdiction grant, in this case involving a commercial vessel owner on waters clearly subject to the commerce legislative power (if not the admiralty), there is district court jurisdiction with respect to limitation of liability.

Both *Butler* and *Hamilton*, *supra*, were cases in which this Court held that claims not falling within general admiralty jurisdiction fell within a limitation proceeding. In *Hamilton* the Court said:

> . . . In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not. This is not only a general principle . . . [citations omitted] . . . *but is the result of the statute, which provides for, as well as limits the liability and allows it to be proved against the fund.* The *Albert Dumois*, 177 U.S. 240, 260. See *Workman v. New York*, 179 U.S. 552, 563.

Id. at 406, emphasis added. As indicated in the italicized portion of the passage, a ground for bringing claims in the limitation proceeding is found in the statute, presumably R.S. § 4284, now § 184 (Appendix hereto), which provides for the owners of damaged property [including personal injuries or deaths, *Butler*, *supra*] receiving compensation from the limitation fund.

Thus, the Limitation of Liability Act not only gives a vessel owner a right to an injunction against commencement or

prosecution of actions outside the limitation proceeding, 46 U.S.C. § 185 (A-40) and Rule F(3) (A-43), but provides the injured party a valuable right to claim in the proceeding and obtain a *pro rata* share of the fund. 46 U.S.C.§ 184 (Appendix hereto). Accordingly, *Three Buoys*' discussion of federal question jurisdiction (A-16-18) is, we submit, largely beside the point.

Finally, in *Richardson v. Harmon*, 222 U.S. 96 (1911), this Court held that a vessel owner was entitled to seek limitation of liability with respect to a non-maritime tort, by virtue of what is now 46 U.S.C. § 189. Accordingly, on the authority of *Richardson,* even if the claims against Three Buoys are non-maritime torts, it is still entitled to seek limitation of liability, and the only court in which it may do so is the district court. *Richardson* plainly held that even though, but for the Limitation of Liability Act, there would have been no admiralty jurisdiction (the tort being non-maritime), the Act sufficed to put the case under district court jurisdiction in admiralty. The same principle applies here, even if there were no general admiralty jurisdiction.

In *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), a case involving an airplane crash in Lake Erie, which bore "no relationship to traditional maritime activity," *id.* at 273, this Court held:

> [I]n the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States.

Id. at 274. The Court noted that the Death on the High Seas Act would be "legislation to the contrary" in an appropriate case. *Id.* n.26. Here the collision clearly involves traditional maritime activity, the issue being whether the status of the waters permits admiralty jurisdiction. Even if there were no "ordinary" admiralty jurisdiction, we respectfully submit that, particularly in these waters subject to federal legislative power (with federal navigation rules evidently applicable), the Limitation of Liability Act would be "legislation to the con-

trary'' which would bring the case within admiralty jurisdiction.

CONCLUSION

We most respectfully urge this Honorable Court to grant the Petition for Certiorari.

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Respectfully submitted,

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APPENDIX

APPENDIX

ADDITIONAL MATERIAL STATUTES

46 U.S.C. § 184. Apportionment of compensation

Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. [R.S. § 4284; Feb. 27, 1877, c. 69, § 1, 19 Stat. 251.]

46 U.S.C. § 189. Limitation of liability of owners of vessels for debts

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners. [June 26, 1884, c. 121, § 18, 23 Stat. 57.]